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The question as to who has the burden of proving negligence in the case of a carriage of goods injured or destroyed while in transit where the carrier has accepted them at "owner's risk" is a nice one, as evidenced by the many conflicting decisions of the courts upon the question. The Supreme Court of Missouri in the recent case of Witting v. St. Louis & San Francisco R. Co. reported on page 99 of this issue place the burden upon the shipper in such a case, and in so holding, overrule in effect previous decisions of the court declared through Judge Wagner. Though there is much to be said on both sides of the question, it does seem that the decision puts upon the shipper more of a burden than should be placed upon him, and in point of fact would oblige him in every case of goods shipped under the circumstances to follow and keep the package in sight from the beginning of the journey to its termination. No one knows so well as the carrier the circumstances under which a package is injured or destroyed, and the evidence pertaining to such injury is always accessible to it. The ruling is in effect an innovation upon the common law liability of carriers, and goes almost to the point of permitting a carrier to free himself absolutely from liability for negligence which the law will not actually allow him to do. The common sense rule would seem to be that in case of a shipment at "owner's risk" it is the duty of a carrier at least to show the circumstances of the injury and due care on his part. Otherwise the prudent thing on the part of a shipper will be to sit on his package throughout the entire journey.

A construction has been put upon the Chinese Exclusion Act by Judge Maxey of the United States District Court for the Western District of Texas, which, if upheld on appeal, will compel a modification of the practice of the Government in sending back excluded Chinese laborers entering the United States in violation of the act. According to Judge Maxey's interpretation of the law, the government has no right, under the act, to send to China, laborers who enter the United States from contiguous countries, such as Canada or Mexico, unless evidence is produced that they came from China, or, in other words, that the language of the law authorizing their return to the country whence they came should in such cases, be construed to mean the contiguous countries and not China.

The nature of the international copyright bill which has recently passed the house of representatives is not generally understood. It provides that foreigners may take out American copyright in three cases. First, when the nation of the foreigner permits copyright to American citizens on practically the same basis as that of its own citizens. Second, when the foreign nation gives to American citizens practically the same privileges as those granted foreign authors. Third, when the foreign nation is a party to an international agreement providing for reciprocity in copyright. Additional provisos were added that all books copyrighted under the proposed act shall be printed from type set in an American printing house, or from plates made therefrom, and that no nation which refuses copyright privileges to American authors can claim any benefit under the bill. It may not be generally known that the copyright law of the United States even so far as its own authors are concerned is very niggardly in comparison with those of other countries. In almost every civilized country the author is assured of a copyright whose benefits shall not only accrue to himself so long as he lives, but to his heirs after him for many years. Even if the adoption of the copyright law does not lead to more beneficial copyright to American authors it will at least benefit them indirectly by shutting out the host of foreign reprints which have tended to crowd out all American authors. The bill seems to have caused much consternation in England especially that provision requiring that American mechanical production shall be a condition precedent to American copyright. At the present time in order to secure copyright in England it is

necessary for the book to be published there, and it is the better opinion that such publication must be the first publication. If, however, the American bill becomes a law in its present form, the question will become a very serious one as the English author to secure full copyright in both countries must print his book in the United States and then wait for a first publication in England.

NOTES OF RECENT DECISIONS.

INTOXICATING LIQUORS—SALE TO MEMBERS, BY SOCIAL CLUBS.—A number of cases have recently come before the courts, involving the question as to the power of a social club to sell liquor to its members, without taking out license therefor, or in derogation of prohibitory or regulatory laws, and in each instance it has been decided that such clubs are within the prohibition or purview of statutes relating to intoxicating liquors. Of these cases three are from Massachusetts, namely, Commonwealth v. Jacobs, 25 N. E. Rep. 463, Commonwealth v. Ryan, *Id.* 465, Commonwealth v. Baker, *Id.* 718. In all these cases it appeared that the liquor was brought to the place and kept by the club there, under the supervision of the steward, in the names of individual members, who called for it from time to time as they wanted it. The court considered that this was "a mere device to cover up the unlicensed sale of intoxicating liquors," and held that such a place must be equally a nuisance under the statute, whether used by a club to sell intoxicating liquors to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. In State v. Easton Social Literary and Musical Club, decided by the court of appeals of Maryland, 20 Atl. Rep. 783, it was also held that the furnishing of intoxicating liquors by an incorporated social club to the members thereof for a price fixed by its regulations, and paid for by the member upon receipt of the liquor, constitutes a sale within the prohibition of the local option law, and that such violations of the law on the part of the club, constitutes such abuse and misuse of its corporate powers and franchises as to furnish cause of forfeiture under code Md. Art. 3, sections 255, 258. The Supreme Court of New Jersey declares substantially the same doctrine in State v. Essex Club, 20 Atl. Rep. 769, and hold that such acts on the part of a social club constitute a sale of liquor by the club, and that the latter are liable to the penalty provided by the city ordinance for selling liquors without licenses. The court cites State v. Mercer, 32 Iowa 405; State v. Lockyear, 95 N. C. 633; Martin v. State, 59 Ala. 34.

TRIAL—CRIMINAL PRACTICE—REMARKS OF JUDGE AND COUNSEL. The case of Bone v. State, 12 S. E. Rep. 205, decided by the Supreme Court of Georgia, contains an interesting and humorous colloquy between the judge and the counsel for the State in a trial of a murder case, which although uncalled for was not of sufficient importance to constitute misconduct, entitling the defendant to a new trial. It appears that the trial judge, when defendant, his family and counsel were passing from the court-room to another room to consult, remarked that "this is spectacular" and the prosecuting attorney said, "small potatoes Mr. Hill," to which Mr. Hill replied, "a few in the hill your honor," to which the court responded, "and stringy at that." All of which was doubtless very funny to the participants, but hardly appropriate under the circumstances.

ELECTIONS AND VOTERS—MANDAMUS—SPEAKER OF THE HOUSE OF REPRESENTATIVES—CANVASSING VOTES—MINISTERIAL DUTIES.—The Supreme Court of Nebraska has just rendered an important opinion in the case of State v. Elder, growing out of the recent election contests, and involving the question as to the power of a court to issue its writ of *mandamus*, compelling the speaker of the house of representatives to open and publish returns of the election for officers of the executive department, which had been sealed up and transmitted by the returning officers to him. The speaker in this case refused so to do, and the application for *mandamus* was made to compel such performance. The court held that it was the duty of the speaker, immediately upon the organization of the house and before proceeding to any other business, to

open and publish said returns of elections. That the performance of said acts was especially enjoined upon the speaker by law as a duty resulting from his office. That the duty so imposed upon him was a ministerial duty in regard to which he was vested with no discretionary power. That it was a duty which could be enforced by a writ of *mandamus* and that he was not relieved of this duty by a resolution of the joint convention of the two houses directing him not to open and publish said election returns, until after the determination of the pending contest. The opinions of Cobb, C. J., and Maxwell, J., learnedly discuss the law bearing upon the question as to whether the duty imposed upon the speaker of opening and publishing election returns in the presence of the two houses is a ministerial one and subject to coercion by the courts.

CARRIERS OF GOODS—INJURY TO FREIGHT—NEGLIGENCE — BURDEN OF PROOF. — In the case of Witting v. St. Louis & S. F. Ry. Co., 14 S. W. Rep. 743, the Supreme Court of Missouri decide a question upon which the authorities are in direct conflict, as to the burden of proving negligence, where goods are shipped by carrier at owner's risk. It is there laid down that in a suit against a common carrier for breaking a marble soda-water fountain shipped "at owner's risk of breakage," the plaintiff has the burden of proving that the loss occurred through the carrier's negligence, and it is error to charge that, if the fountain was received in good order and, by the exercise of ordinary care, could have been carried and delivered in like good order, then the law presumes that the breakage was caused by the carrier's negligence. Black, J., says:

The real question presented is, upon whom did the burden of proof on the issue of negligence rest when this case went to the jury? Upon this question, the authorities are in direct conflict. On the one hand, it is held that, when the common carrier relies upon a contract exemption, he must bring himself within the exemption, and that he does not do this by simply showing that the goods were lost, or destroyed, or injured, by the excepted peril or accident, but that he must go further, and show that he was free from any negligence contributing the loss or injury. The following are some of the cases which support this doctrine: Brown v. Express Co., 15 W. Va. 812; Berry v. Cooper, 28 Ga. 543; Railroad Co. v. Moss, 60 Miss. 1003; Graham v. Davis, 4 Ohio St. 362; Express Co. v. Graham, 26 Ohio St. 595. The same doctrine was asserted by this court in Levering v. Insurance Co., 42 Mo. 89, and in the subsequent case of Ketchum v. Express Co., 52 Mo. 390. The question arose in the first of these cases on a bill of lading for the shipment of cotton, containing the words "at owner's risk of fire." Judge Wagner, speaking for the court, said it devolved upon the defendant to show, notwithstanding the exception from liability stated in the contract, that the accident did not occur through any fault, want of care, or negligence on the part of defendant or its agent. By the other line of authorities it is held to be sufficient for the carrier to show that the loss or damage was occasioned by some accident or peril, from liability for which he is exempted, either by his contract or by law, and that he is not required to go further and show, in addition, that he was free from negligence contributing to the loss or damage. The following are some of the cases which assert this doctrine: Lamb v. Railroad Co., 46 N. Y. 271; Whitworth v. Railway Co., 87 N. Y. 413; Farnham v. Railroad Co., 55 Pa. St. 53; Patterson v. Clyde, 67 Pa. St. 500; Railway Co. v. Talbot, 39 Ark. 526; Railroad Co. v. Reeves, 10 Wall. 176; Read v. Railroad Co., 60 Mo. 199; Davis v. Railway Co., 89 Mo. 340, 1 S. W. Rep. 327. Observations made in Wolf v. Express Co., 43 Mo. 422, are in line with the cases just cited but the question of the burden of proof did not fairly arise in that case. It did, however, arise in the case of Read v. Railroad Co., *supra*. In that case the potatoes were shipped at owner's risk of freezing. On the subject of the burden of proof this court, speaking by Wagner, J., said: "When the loss occurs from any of the causes excepted in the undertaking, the exception must be the proximate cause of the loss, and the sole cause. And where the loss is attributable to such cause, still, if the negligence of the carrier mingles with it as an active and co-operating cause, he is responsible. When the loss of the goods is established, the burden of proof devolves upon the carrier to show that it was occasioned by some act which is recognized as an exception. This shown, it is *prima facie* an exoneration, and he is not required to go further and prove affirmatively that he was guilty of no negligence. The proof of such negligence, if negligence is asserted to exist, rests on the other party." This quotation has been made for the purpose of showing that the court then abandoned the rule concerning the burden of proof, laid down in the prior case of Levering v. Insurance Co., *supra*, and Ketchum v. Express Co., *supra*. There can be no doubt but the earlier cases were overruled on the point we are considering. They cannot stand as law in the face of the quotation we have made. Seventeen years later, the principle of law asserted in Read v. Railroad Co., was applied in Davis v. Railway Co., *supra*. It must therefore be taken as the established law of this State that when the cause of action stands on the ground of negligence on the part of the carrier, the burden of proof is upon the plaintiff. The authorities cited are not all agreed as to the ground upon which the rule stands. The true reason, it seems to us, is that negligence is a positive wrong, and will not be presumed, though it may be inferred from circumstances.

NEGLIGENCE—ELECTRIC LIGHT WIRE—CONTRIBUTORY NEGLIGENCE.—The Supreme Court of Indiana in the case of Brush Electric Lighting Co. v. Kelley, 25 N. E. Rep. 812, decide that the failure of a traveler to notice in the day-time an electric light wire on the

sidewalk, over which she stumbled and fell, is not contributory negligence as a matter of law, and will not prevent her from recovering for the injuries from the company. Berkshire, J., says:

We do not think that it necessarily follows that the appellee was *prima facie* guilty of negligence in not observing the obstruction. She had the right to presume that the sidewalk was free from obstruction until her attention was in some way called thereto, and to act upon such presumption. We quote the following from Elliott on Roads and Streets, at page 471: "The question of contributory negligence is generally for the jury to determine from the circumstances of the case. The following cases illustrate the principles above stated in regard to contributory negligence, and show their application to particular facts. When the plaintiff, assuming that a sidewalk was safe, and knowing nothing to the contrary, permitted her attention to be momentarily attracted to some children playing in the street, and fell into a hole in the sidewalk from which the cover had been removed, she was held not guilty of contributory negligence." The author cites the following cases in support of one in text: Barry v. Terkildsen, 72 Cal. 254, 13 Pac. Rep. 657; Hussey v. Ryan, 64 Md. 426, 2 Atl. Rep. 729; Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. Rep. 424; Kelley v. Blackstone, 147 Mass. 448, 18 N. E. Rep. 217. We cite also our own case of Gas Co. v. Laehr, 124 Ind., 24 N. E. Rep. 579. A small wire lying along a sidewalk might very reasonably be overlooked by a passer-by who has no notice thereof, and the fact that it is overlooked does not necessarily indicate negligence. We cannot hold, as a question of law, that a person may not pass along a sidewalk cautiously and fail to observe a small wire lying along or across it; and then we can imagine many circumstances whereby the attention of the pedestrian might be attracted from the sidewalk which would be sufficient to divert the attention of any reasonably prudent person. The case of Railway Co. v. Dailey, 110 Ind. 75, 10 N. E. Rep. 631, which counsel cite, is not in point. That was an action by an employee against a railway company to recover damages attributable to the negligence of the company in the employment of an unskilful and careless fellow-servant. In this class of cases, the court require as a rule of pleading that in addition to the ordinary negative allegation as to contributory negligence, it must appear by a specific allegation that the plaintiff had no knowledge of the careless habits or want of skill of his fellow-servant, for the reason that the presumption will be, in the absence of such allegation, that the plaintiff had knowledge of such want of care or skill, and with such knowledge assumed the risk by continuing to serve his employer; and, having taken upon himself the risk, he cannot recover, whether he was or was not guilty of negligence contributing to the injury. The case of Riest v. City of Goshen, 42 Ind. 342, we think is an authority against the appellee. In this case, the court says that "the averment must be expressly made in the complaint that the injury occurred without fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case." The other cases cited do not militate against our conclusion.

RECEIVER—INSURANCE COMPANY—CORPORATION—STOCKHOLDERS.—The case of Republic Life Insurance Co. v. Swigert, 25 N. E. Rep. 680, decided by the Supreme Court of Illinois, is of special interest on the subject of the powers and duties of receivers of corporations. The main question before the court was as to the validity of an order made by the lower court directing the receiver of a defunct life insurance company to institute proceedings against stockholders for unpaid subscriptions to stock. It appeared that an agreement had been entered into between the corporation and its stockholders whereby the latter who had only paid 20 per cent. of the par value of their stock, surrendered their stock in exchange for full paid stock to the amount of one-fifth of their subscriptions. The court held not only that such an agreement was valid, but that the receiver had no power either by virtue of its appointment, by a court of equity or deed of assignment to him by the corporation or by statute to sue stockholders for such unpaid subscriptions to stock which had been surrendered to the corporation, since the roceiver had no greater rights than the corporation itself. The question as to whether a receiver is to be regarded as representing only the corporate body itself or its creditors or shareholders was ably discussed by Baker, J., as follows:

We understand the rule to be that, where the receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it; and that, for purposes of litigation, he takes only the rights of the corporation, such as could be asserted in his own name; and that upon that basis only can he litigate for the benefit of either stockholders or creditors. In High on Receivers (section 315) the rule is formulated substantially and almost in words as stated above, except that the rule is qualified in said section by the statement that when acts have been done in fraud of the rights of creditors, but which are valid as against the corporation itself the receiver holds adversely to the corporation. The only authority cited as sustaining the qualification found in the text is the case of Curtis v. Leavitt, 15 N. Y. 44. That case was decided upon the basis of such qualification. It was assumed and conceded by counsel upon the argument of the case that the receiver succeded to the rights of the creditors. It was announced in the opinion of the court that, for all the purposes of the present controversy," they would "proceed upon this assumption." The receivership there in question was constituted under the statutory provisions in which were found the expressions: "Appoint one or more receivers to take charge of the property and effects of the corporation;" "the property that may belong to it;" "are vested with all the estate, real and personal, of such

corporation;" "as trustees for the benefit of creditors and stockholders;" "deemed vested with all the real and personal estate of the debtor;" and "power to sue in their own name or otherwise and recover all the estate, debts, and things in action belonging or due to such debtor, in the same manner and with the like effect as such debtor might or could have done if no attachment had been issued or trustees appointed." Comstock, J., in his opinion said "it has been said in this, as in other cases, that the receiver represents the creditors and the stockholders, but, for all the purposes of inquiry into his title, he really represents the corporation. He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders, but this only proves that they are the beneficiaries of the fund in his hands, without indicating the sources of his title, or the extent of his powers. If, then, in a controversy between the receiver and third parties in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name the receiver does not represent those rights. So far as the shareholders are concerned he can litigate respecting the fund upon precisely the grounds which would be available to the corporation, if it were still in existence, solvent, and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to."

In Alexander v. Relfe, 74 Mo. 495, it was said in the opinion of the court: "When acts have been done in fraud of the rights of creditors, the receiver may litigate for their benefit, though the acts in question be valid as to the corporation itself, in which case he holds adversely to the corporation." This language was wholly unnecessary to the decision of the case, and the only authority cited therefor was High, Rec. § 315, and cases cited, which we have mentioned and considered above.

In Hyde v. Lynde, 4 N. Y. 387, it was said by Bronson, C. J.: "The recovery in this case seems to have gone upon the ground that the receiver had greater rights than those which belonged to the company. But for most, if not for all purposes he took the place, and stands as the representative, of the company. He is as much bound by a settlement which the company was authorized to make as was the company itself. It would be strange, indeed, if the legal acts of a corporation did not bind the receiver of its effects. * * * If the settlement, though a lawful act in itself, had been made for an illegal purpose, if, for example, the parties had known that there were valid claims against the company to the payment of which the defendant ought to contribute, and yet the note was given up without consideration, for the purpose of defrauding either the creditors or the other members of the corporation, the persons defrauded would undoubtedly have a remedy. But I do not see how the receiver could sue. It would be like the case of a conveyance of property for the purposes of defrauding the creditors of the grantor; which, though void as against the persons intended to be defrauded, is nevertheless valid against the grantor, and all who represent him. A receiver of the effect of such a grantor could not avoid the grant. Neither can this receiver avoid a settlement which bound the corporation, though in the supposed case, it was a fraud upon the creditors, and other members of the company. The person injured must sue."

In Farnsworth v. Wood, 91 N. Y. 308, the court said: "The rights of certain creditors to prosecute their claims against certain of the stockholders never were the property of the corporation, nor rights of action vested in it, nor is there any provision of the statute which transfers their rights of action from the creditors to the receiver."

In Coope v. Bowles, 42 Barb. 87, it was held that a receiver is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain; and that he must show a cause of action existing in those parties, and that by the appointment of the court, lawfully made in a matter where the court had jurisdiction, the power had been conferred on him, in his representative capacity, to prosecute the action.

In Insurance Co. v. Hill, 60 Me. 178, a bill in equity was brought in behalf of the creditors of the corporation by the plaintiffs, who were trustees, under a winding-up statute which gave them power to take charge of the estate and effects of the corporation, and to collect its debts, and to prosecute and defend suits. The defendant was a stockholder, director, and treasurer of the company. The bill charged that he had illegally surrendered securities to stockholders; that he had illegally sold to the company a large amount of stock, and received payment therefor, when he knew the company was insolvent; and that he had committed a variety of other acts, which were set out in detail, done by virtue of contracts with the company, which were alleged to be illegal, fraudulent, and void. A demurrer to the bill was sustained, and it was dismissed. It was there said: "The trustees represent the corporation alone and not its creditors or stockholders. * * * The claims of the creditors and of the stockholders, if they have any, are, in the first instance, against the corporation, and they have no other except as provided by law. If the conduct of the corporation, its officers or stockholders, has been such as to give other remedies to the creditors, such may properly be pursued in their own names. So far as their rights are in question, they must be vindicated by themselves, and not by others in their behalf."

See also Waterhouse v. Jamieson, 2 Paters (Scotch), 1812, and L. R. 2 H. L. Sc. 29; Leifchild's Case L. R. 1 Eq. 231. * * * Defendants in error cite numerous cases in which it has been decided that a receiver could bring suit to set aside a transaction which was binding upon the person or corporation over whose estate he was appointed. Almost all of the cases cited by defendants in error fall in one or another of the four classes following: Where the receiver, by force of some statute, can act for the creditors; where the act complained of was *ultra vires*, and not binding upon the corporation; where the receiver was appointed in a proceeding prosecuted by creditors, which was supplemental to execution, and the receiver had the rights of the creditors at whose instance and to secure whose claims he was appointed; and where the receiver was suing for property or assets that belonged to the debtor. With the law of such cases we have no fault to find. To analyze and examine the various cases cited would unduly expand the proportions of this opinion, and would accomplish no useful purpose. We do not wish to be understood as saying that there is no conflict in the authorities in regard to the matter under consideration; but we think the decided weight of authority sustains the rule in respect to the powers of receivers, where there

has been no enlargement of their powers by legislative enactment that they have such rights of action only as were possessed by the persons or corporations upon whose estate they administer. A receiver is the the right hand and creature of the court of equity, and he has such powers as are conferred upon him by the order appointing him, and the course and practice of the court. It will hardly be claimed, however, that the court of chancery, even with all its inherent powers, is authorized, in the absence of legislative sanction, to clothe its receiver with power to seize and enforce a property right which belongs only to parties who are not before the court, nor asking its assistance.

THE CRIME OF RAPE.

General Incidents of the Indictment—At common law, rape is defined as the carnal knowledge of a female, forcibly and against her will.[1] There is a want of uniformity in the common law decisions as to what constitutes carnal knowledge, and prisoners were repeatedly acquitted for want of proof of emission.[2] The statutes of the several states seem to have adopted substantially, the words of the common law in defining the crime. The crime is not defined in the Revised Statutes of the United States, but it is provided, in effect, that the punishment for the offense committed on the high seas, or in the forts, arsenals, or other places within the exclusive jurisdiction of the United States, shall be death.[3] In the common law forms of indictments for this offense, the charge against the accused is that he "violently and feloniously did make an assault, and her the said A. B., against the will of her, the said A. B., then and there, feloniously did ravish and carnally know." The word "forcibly" is generally used in this country in charging the offense, and while it has been held that the word "violently" is an adequate substitute; it is evident that the latter word, when used as descriptive of force, is not the equivalent of the word "forcibly." The common law, while tender of the rights of parties in any case where mere property interests were involved, and hence if any considerable value was at stake, provided adequate courts of review to correct possible errors in the proceedings; yet, if a criminal charge was made against a person, he was looked upon as a felon, even before conviction; and no matter what errors were committed during the trial, the verdict of the jury was final. Hence, although we have luminous expositions of the law by the highest court of Great Britain upon questions where mere rights of property were involved a conviction of felony, by reason of which the accused was deprived of his liberty and branded as a felon, was of so little importance that no tribunal has been provided to review such cases.[4] It is true, that that court has possessed the power for three hundred years of requiring the record to be certified up to it for examination, but until within the last fifty years the question of the admission of improper evidence, or the giving of improper instructions, do not seem to have been considered as grounds for a new trial.[5] A much more liberal policy has prevailed in the State courts of the United States, and the almost uniform practice has been to extend to criminal cases so far as the revision of verdicts is concerned, substantially the same rules as have been established in civil cases. Hence, any material error in the proceedings, tending to prevent a fair trial, may be sufficient cause for a new trial.

Proof of Penetration—While the slightest penetration is sufficient, there must be proof beyond reasonable doubt of some[6] though the

[1] 4 Black. Com., 210.

[2] 1 Hale P. C. 628; 1 Hawk. P. C. Ch. 41, Sec. 1; 1 East, P. C. 437, 438. This difficulty is obviated in all, or nearly all of the States, by statute which renders such proof unnecessary. In Ohio and North Carolina proof of emission was once, but is no longer required. Williams v. State, 14 Ohio, 222; Blackburn v. State, 22 Ohio St. 102; State v. Hargrave, 65 N. C. 466.

[3] Rev. Stat. U. S., secs. 5339, 5345. By the ancient common law, the offense was punishable with death. William the conqueror, however, mitigated the punishment by depriving the guilty party of sight, and otherwise maiming him. The woman injured however, had power to prevent this sentence by accepting the accused as her husband. 2 Inst. 180; 1 Hawk. P. C. Ch. 41, sec. 11; By the Stat. 3 Edw. I. Ch. 13, the punisnment was reduced to two years imprisonment, and a fine; soon afterward, however, the offense was declared a felony, punishable with death. Westminister 2, Ch. 34, and by Stat. 18 Eliz. Ch. 7, it was excluded from benefit of clergy. The punishment, in nearly all of the States, is imprisonment in the penitentiary. By the Mosaic law, the punishment was death, if the woman was betrothed to another man; if not so betrothed, the ravisher was to pay a fine of fifty shekels of silver, and she was to become his wife. Deut. xxii, 25, 28, 29.

[4] There are therefore but few adjudications by the court of last resort of that nation. State v. Johnson, 67 N. C.; Com. v. Fogerty, 8 Gray, (Mass.) 488.

[5] Regina v. Scaife, 2 Den. C. C. 281, 17 Q. B. 283.

[6] Wharton on Crim. Law, 555; Rex v. Russen, 1 East, P. C. 438; Rex v. Allen, 9 C. & P. 31; Stout v.

proof of this may be inferred from circumstances aside from the statement of the party injured.[7]

Consent and Resistance—In the order of proof, it is necessary, in the first instance to introduce testimony to show that the crime has, in fact, been committed by some one. This is usually done by calling the person making the charge, as a witness. If the charge be well founded there will, ordinarily, be marks on her person or clothing, or both, showing that she resisted, and was overcome. Upon the question of resistance there is a great diversity of opinion in the view of courts, and many cases may be found in which it is held that the utmost resistance is not necessary—apparently basing the opinion on the words "against her will." If, however, there was partial consent, then the charge of force fails; because neither courts nor juries can divide consent into degrees, and say that any degree constitutes resistance.[8] The later well-considered cases require, that in order to prove the crime, where the female is above the age of legal consent and was conscious and in the possession of her mental faculties, and not overcome by numbers, or terrified by threats, or in such a place or position that resistance would be useless, that she must have resisted to the extent of her ability at the time and under the circumstances.[9] Where the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such act being guaged by her own capacity) the consummated act is rape.[10] Whether having carnal knowledge of a woman under circumstances which induce her to suppose it is her husband, amounts to rape has been a mooted question in England, though a conviction was recently (1878) sustained by a divided court.[11] Such an act has in Connecticut and New York been held to be rape,[12] though a contrary view has been taken in Tennessee, Alabama and North Carolina.[13] If the mere refusal to give assent was sufficient to establish the crime of rape, a very large proportion of the cases of illicit intercourse, no doubt, could be brought under that charge, and without doubt, would be, particularly where the conduct of the parties was brought to light and there was danger that the woman would be exposed to public odium. The law, therefore, recognizes the fact, that if she is in earnest in her resistance, she will use all her power to prevent the consummation of the act, and while resisting the act, in order to secure assistance, will make outcry.

Evidence of Complaints—To corroborate the charge, it is competent to prove by her, or by outcry or both, that after the alleged rape she complained of it to certain persons, and showed by her appearance, particularly where there are marks of violence on her person and other indications of a struggle, that apparently she had met with rough treatment.[14] These complaints, to be of any value, should be made soon after the alleged offense is committed.[15] But delay in making complaint

Com. 11 S. & R. 177; Waller v. State, 40 Ala, 325; Dans v. State, 43 Tex. 189; Bean v. People (Ill.) 16 N. E. Rep. 656.

[7] Rex v. Lines, 1 C. & K. 393; Bauer v. State, 25 Wis. 413; State v. Tarr, 28 Iowa, 397; Taylor v. State, 111 Ind. 279; s. c., 12 N. E. Rep. 400.

[8] While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman opposed all the resistance in her power, if her resistance was honest and was the utmost according to her lights that she could offer. Wharton on Crim. Law, § 557. Com. v. McDonald, 110 Mass. 405; Crockett v. State, 49 Ga. 185.

[9] People v. Dohring, 59 N. Y. 374; People v. Morrison, 1 Parker Cr. R. 625; People v. Benson, 6 Cal. 221; Whitney v. State, 35 Ind. 506; Anderson v. State, 104 Ind. 467; Oleson v. State, 11 Neb. 276; State v. Burgdorf, 53 Mo. 65. In the latter case, it is said: "The passive policy, or a mere half way case will not do." Taylor v. State, 50 Ga. 79; People v. Brown, 47 Cal. 447; Connors v. State, 47 Wis. 523; Whittaker v. State, 50 Wis. 518; Matthews v. State, 19 Neb.; People v. Abbott, 19 Wend. 194. In the latter case, it is said: "Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance, is always received. That there was not an immediate disclosure, that there was no outcry though aid was at hand and that known to the prosecutrix, that there are no indications of violence to the person, are put among the circumstances of defense; not as conclusive, but as throwing distrust upon the assumption that there was a real absence of assent."

[10] Rex v. Jones, L. R. 2 C. C. 10; State v. Roth, 21 Kan. 131; Lewis v. State, 30 Ala. 54.

[11] Rex v. Young, 38 L. T. (N. S.) 540.

[12] State v. Shephard, 7 Conn; People v. Metcalf, 1 Wheel. C. C. 378.

[13] Wyatt v. State, 2 Swan. 394; Lewis v. State, 30 Ala. 54; State v. Brooks, 76 N. C. 1, and see Com. v. Fields, 4 Leigh, 648.

[14] The necessity of outcry is recognized in the Mosaic law. Deut. xxii, 24, 27. If the woman was in the city and made no outcry, she was considered as consenting, and therefore should suffer death; but if she was in the field—where outcry would be unavailing,—the failure was not considered evidence against her, and proof of outcry or cause to excuse the failure is generally required.

[15] 4 Black. Com. 213; Dunn v. State, 45 Ohio St. 252; Higgins v. People, 58 N. Y. 377; State v. Peter, 8 Jones, N. C. 19; Topolanck v. State, 40 Tex. 160; Peo-

may be explained or accounted for.[16] At common law the usual course is to ask the prosecutrix whether she made complaint; and if so, to whom; and if she testify that she made complaint, and names the person to whom it was made, such person may be called to prove that fact;[17] but neither the prosecutrix, nor such person can testify to the particulars of the complaint.[18] The reason is, that such statements are made under oath, and are made in the absence of the party charged, without an opportunity for cross-examination. The common law rule has generally been followed by the courts of this country, although in a few cases, it has been held that the particulars of the complaint may be given in evidence by the prosecution, not as snbstantive testimony to prove the commission of the offense, but to show that the prosecutrix has testified to the same facts that she made in her complaint.[19] The difficulty with this kind of testimony is, that it is merely hearsay, and being submitted to the jury, is considered by it for all purposes. This departure from the rules of the common law seems to have originated in Ohio. In Johnson v. State[20] the prosecution offered to prove to the jury the declarations of the injured female the same day of the alleged offense as evidence to prove the offense committed. This testimony was objected to and the objection was overruled and the evidence received and for this cause the evidence having been introduced in chief the judgment was reversed. In Laughlin v. State[21] the facts are very imperfectly stated but we are led to infer that the statements of the prosecutrix were permitted to be given as evidence in chief. This was followed by McCombs v. State,[22] in which the distinction between proof of the main facts and proof in corroboration is except in name, ignored.[23] In Burt v. State[24] the court in holding such statement admissible say: "They are to be received not as evidence of their own truth, not as evidence of the guilt of the defendant, but merely in corroboration of the prosecuting witness in the sense that they remove from her testimony a cloud of suspicion that might otherwise rest upon it." And this doctrine has been affirmed in a later case in the State.[25] In some of the States this proof is admitted to sustain the testimony of the prosecutrix when such testimony has been attacked.[26] This is a modified form of what may be termed the Ohio rule and it is evident that the rule itself and the modification thereof violate the clearest principles of justice, by giving to *ex parte* hearsay statements made, it may be for a purpose, the force and effect of sworn testimony, and in reality giving the evidence of

ple v. O'Sullivan, 104 N. Y. 481: McGee v. State, Tex. 2 S. W. Rep. 890; McMurrin v. Rigby (Iowa), 45 N. W. Rep. 877. In some of the cases it is said, in effect, that delay in making the complaint merely weakens the testimony, and that it is still competent. It is scarcely possible that a woman has been ravished, her person abused,—it may be, mutilated—and her modesty and sense of decency outraged, will conceal the fact from every one for weeks or months, and then, for the first time assert the commission of the crime; the corroborating proof being wholly wanting. In most cases it will be found that such stale charges are fabrications brought to serve an ulterior object. Johnson v. State, 43 N. W. Rep. 426.

[16] Higgins v. People, 58 N. Y. 377; State v. Niles, 47 Vt. 82; State v. Shettleworth, 18 Minn. 208; State v. Knapp, 45 N. H. 148; State v. De Wolf, 8 Conn. 93.

[17] State v. Niles, 47 Vt. 82; Baccio v. People, 41 N. Y. 265; Stephen v. State, 11 Ga. 225; McMath v. State, 55 Ga. 303; Hogan v. State, 46 Miss. 274; Lacy v. State, 45 Ala. 80; State v. Jones, 61 Mo. 232; Oleson v. State, 11 Neb. 277; People v. Gage, (Mich.) 28 N. W. Rep. 835.

[18] State v. Knapp, 45 N. H. 148; State v. Ivins, 36 N. J. L. 233; State v. Jones, 61 Mo. 232; Pefferling v. State, 40 Tex. 486; State v. Gruss, 28 La. Ann. 952; People v. Mayers, 66 Cal. 597; Stephen v. State, 11 Ga. 225; Rex v. Clarke, 2 Stark. N. P. C. 241; 3 Stark. Evid. 951; Reg. v. Watkins, 2 N. & Rob. 212; State v. Campbell (Nev.), 17 Pac. Rep. 620; Lee v. State, (Wis.), 41 N. W. Rep. 960; McMurrin v. Rigby (Iowa), 45 N. W. Rep. 877; Ellis v. State (Fla.), 6 South Rep. 763. But the party to whom the injured one made complaint may testify that she showed him the marks on her person. Hannan v. State (Wis.), 36 N. W. Rep. 1.

[19] Johnson v. State, 17 Ohio 592; Phillips v. State, 9 Humph. 246; Brown v. State, 36 Mich. 203. The judgment in the case cited from Ohio was reversed, because such evidence had been introduced in chief, to prove the commission of the offense.

[20] Supra.

[21] 18 *Ibid.* 99.

[22] 8 Ohio St. 646.

[23] It is said "whatever may be the rule elsewhere, it is settled in Ohio that in a prosecution for rape or for an assault with intent etc., the substance of what the prosecutrix said or the 'declarations' made by her immediately after the offense was committed may be given evidence in the first instance to corroborate her testimony."

[24] 23 Ohio St. 400. 401. See also Phillips v. State, 9 Humph. 246; State v. DeWolf, 8 Conn. 93; State v. Kinney, 44 *Id.* 153; State v. Peter, 14 La. Ann. 521.

[25] Dunn v. State, 45 Ohio St. 251.

[26] State v. Jones, 61 Mo. 232; Scott v. State, 48 Ala. 420; State v. Laxton, 78 N. C. 564; Pleasant v. State, 15 Ark, 624; State v. DeWolf, 8 Conn. 93; State v. Campbell (Nev.), 17 Pac. Rep. 620; Barrett v. State (Ala.), 3 South. Rep. 612; Barnes v. State (Ala.), 7 South. Rep

the prosecutrix the weight of that of two witnesses. The sympathy of the jury is almost invariably inclined in favor of the party claiming to have been injured, therefore such testimony is not necessary in an actual case, while in doubtful cases or in those in which the woman is a mere instrument in the hands of designing parties who are seeking to accomplish an ulterior object by a false accusation it becomes a means of bolstering up a false charge. That accusations of the latter character are not infrequent, is well known to every lawyer of extensive practice. The complaint constitutes no part of the *res gestæ* and where the prosecutrix is not called as a witness it cannot be received in evidence.[27] This rule applies alone to communications made by the prosecutrix and does not exclude proof as to her appearance recently after the alleged act, marks of violence on her person or the torn and disordered state of her dress. These are material circumstances and are always admissible in evidence whether she be sworn or not.[28]

Impeachment—The prosecutrix who has been examined as a witness may be impeached by proving her reputation for truth to be bad at the time she is examined, and it is error to limit such inquiry to the time of the commission of the alleged offense.[29] Unless the reputation of the prosecutrix has been attacked, evidence of her good character cannot be received.[30]

Want of Chastity—At common law it was formerly held that the accused might prove the want of chastity of the prosecutrix by general evidence but not by specific acts.[31] And it has been ruled in some of the States, that the prosecutrix can not be compelled to answer questions as to prior sexual relations with other persons.[32] And in some, it has been held, that though proof of general reputation for chastity may be made yet that specific acts of sexual intercourse on part of prosecutrix is not admissible.[33] In many of the States, however, the rule has been adopted that evidence of specific acts may be given, and that the prosecutrix may be compelled to answer such question.[34] While an unchaste woman is entitled to the protection of the law the same as one of good character, yet in considering the probabilities of the resort of force it is not reasonable to suppose that one who makes commerce of her person and has consented if not induced the same, will make resistance to what to her has been a matter of ordinary traffic.[35] In cases where the female by reason of non age or other cause is unable to give lawful consent, the law throws its mantle around her and declares in effect, that consent is no justification and the fact being established force is conclusively presumed.

In conclusion, while the crime is a detestable one and when fully established should be severely punished, yet it is an accusation easy to make and difficult for the party accused to defend against, though he be innocent. These facts, together with the knowledge, or rather belief founded on observations that many cases of conviction take place where in truth no crime has been committed, or if a crime, one of a much lower grade than

[27] People v. McGee, 1 Dennis 19. In this case it is said: "I do not doubt the true rule is that when the person upon whom the offense is charged to have been committed is incompetent by reason of infancy, idiocy, insanity and the like to be sworn and give evidence as a witness; that no evidence of the assertions or declarations of such person descriptive of the offense or the offender can be received in evidence." Reg. v. Gutheridge, 9 Carr. & P. 471; Reg. v. Megson, *Id.* 428.

[28] 1 Hale P. C. 628; 1 Hawk. P. C. 41, 56; 4 Black. Com. 214; People v. McGee, 1 Dennis 19; Hannan v. State (Wis.), 36 N. W. Rep.

[29] Pratt v. State, 19 Ohio St. 277; State v. Fornisher, 43 N. H. 89.

[30] People v. Hake, 3 Hill, 309; In Rex v. Clark, 2 Stark, 241, the prosecutrix admitted on her cross-examination that some years before she had twice been sent to the house of correction on charges of larceny and the court admitted evidence to show that her subsequent conduct had been good.

[31] R. v. Clark, 2 Stark. 241; R. V. Hodgson, R. & R. 211; R. v. Mastin, 6 C. & P. 562.

[32] State v. Knapp, 45 N. H. 148; Com. v. Reagan, 105 Mass. 593; McCombs v. State, 8 Ohio St. 643; Wilson v. State, 16 Ind. 392; State v. White, 35 Mo. 500; Pleasant v. State. 15 Ark. 624; People v. Benson, 6 Cal. 221; People v. Hamilton, 46 Cal. 140; Com. v. Harris, 113 Mass. 336; as to having been a person of unchaste character. Fry v. Commonwealth, 82 Va. 384.

[33] Com. v. Harris, 131 Mass. 336; McCombs v State, 8 Ohio St. 643; Wilson v. State, 16 Ind. 392; State v. Campbell 7 (Nev.), 17 Pac. Rep. 620; McQuirk v. State, Ala. 4 South Rep. 775.

[34] People v. Abbott, 19 Wend. 192; State v. Johnson, 28 Vt. 512; State v. Reed, 39 Vt. 417. People v. Benson, 6 Cal. 221; Contra State v. Jefferson, 6 Ind. 305; McCombs v. State, 8 Ohio St. 642; Wilson v. State, 16 Ind. 392. But evidence must be confined to the time previous to the alleged rape. State v. Ward (Iowa), 35 N. W. Rep. 617.

[35] Evidence that the prosecutrix is a common strumpet is no bar but is relevant for the defense as one of the circumstances from which assent may be inferred. Pratt v. State, 19 Ohio St. 277; Higgins v. People, 1 Hun, 307.

that charged, should lead courts and juries to a calm and dispassionate examination of each case. And even where the jury has returned a verdict of "guilty" this court on a motion for a new trial should scrutinize the evidence, and if it fails to sustain the charge, fearlessly set the verdict aside.

To protect the innocent as well as punish the guilty, is a duty which no court can surrender. It is one of the beneficient provisions of the law, placed in the hands of its ministers for that purpose, and no court worthy of the name, will fail to exercise the right. This however, is not to be used as a pretext for the escape of the guilty, but rather to induce a closer scrutiny of the evidence, to see if it establishes guilt. In the language of Ch. J. Hale, who after mentioning several cases which came under his own observation, says: "I mention these instances that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance, the heiniousness of the offense many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of false and malicious witnesses."

SAMUEL MAXWELL.

NEGOTIABLE INSTRUMENT—BOHEMIAN OAT NOTE—VALIDITY—INNOCENT HOLDER—GAMING.

SCHMUECKLE V. WATERS.

Supreme Court of Indiana, Oct. 8, 1890.

1. Where the agents of the company pretended to sell appellees 10 bushels of Bohemian oats at $10 a bushel, the company, as a part of the transaction, executing its bond in return, in which it engaged to sell 20 bushel of oats, less a stipulated commission, the oats to be sold at a date prior to the maturity of the note, which the appellees executed payable to Peter Certia as their part of the transaction; the bond containing the following stipulation: "It is agreed and understood by and between the parties named in this bond, that the transaction covered by this obligation is of a speculative character, and is not based upon the real value of the grain." *Held*, That as between the parties such contract and note is void.

2. *Innocent Holder.*—That in the hands of an innocent holder the note is valid.

3. *Gambling Contract.*—That such a contract is not a gaming or gambling contract or transaction, so as to make the note absolutely void.

4. *Inquiry of Purchaser.*—Where the circumstances show that the purchaser refrained from making inquiry, lest he should thereby become acquainted with the transaction out of which the note originated, he cannot occupy the attitude of a holder in good faith, without notice.

MITCHELL, J.: The appellant, Schmueckle, instituted suit to recover the amount due on a promissory note signed by the appellees, payable to the plaintiff's assignor, at a bank in this State. It is disclosed by the evidence that the note originated in a transaction between the makers thereof and certain persons who claimed to represent an incorporated company having its principal office in the State of Ohio. The agents of the company pretended to sell the appellees 10 bushels of Bohemian oats at $10 a bushel, the company, as a part of the same transaction, executing its bond in return, in which it engaged to sell 20 bushels of oats for the makers of the note, at $10 a bushel, less a stipulated commission, the oats to be sold at a date prior to the maturity of the note, which the appellees executed payable to Peter Certia, as their part of the transaction. The bond contained the following stipulation: "It is agreed and understood by and between the parties named in this bond that the transaction covered by this obligation is of a speculative character, and is not based upon the real value of the grain." Between the parties to it, such a contract as is disclosed by the record is plainly void as against public policy. The note and the bond were executed at the same time, as parts of one transaction, between the same parties, and related to the same subject-matter. The rule is, where two or more writings are executed at the same time, and relate to the same transaction or subject-matter, they must be construed together in determining the contract between the parties. Sutton v. Beckwith, 68 Mich. 303, 36 N. W. Rep. 79. Taking the transaction in its full measure and scope, and it was simply this: Ten bushels of oats, of the actual value of 30 or 34 cents a bushel, were delivered by one party to the other, upon an agreement that the party receiving the oats should execute his note for $100, the party furnishing the oats agreeing in turn to sell 20 bushels of oats, to be delivered by the maker of the note, at the price of $10 per bushel, both parties presumably having full knowledge of the actual value of the oats. One who voluntarily, with his eyes open, and without being overreached or defrauded, engages in a transaction such as that, simply becomes a party to a gambling contract, which the law will not enforce between the parties, or those having notice of the nature of the transaction. There is no validity or virtue in any contract, unless the parties between whom it is made have the power to appeal to the courts of public justice for redress in case of its violation. A transaction which, in its objects, operation, or tendency, is prejudicial to the public welfare, is against public policy, and will not be enforced between the parties to it. It is abundantly clear that the makers of the note

would not have given their obligation to pay $100 for property worth $3 or $4, except upon the consideration that the company agreed to sell 20 bushels of oats for them at a price which made it necessary to find some other person who was either a knave or a dunce, before the maturity of their note. This was plainly, as was disclosed in the face of the bond, a mere speculative or wagering contract, and void between the parties. Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. Rep. 687; McNamara v. Gargett, 68 Mich. 454, 36 N. W. Rep. 218.

If the note was obtained by fraud, it was equally unenforceable in the hands of the original holder or in the hands of one affected with notice of the fraud. The note was, however, commercial paper, and since there is no statute declaring such notes void in the hands of an innocent holder, would have been enforceable, if the holder had made it appear that he was a *bona fide* purchaser for value without notice. It is established that where a note originates in a transaction that is void as against public policy, or where it is obtained from the maker by fraud or false pretenses, the burden of proof is upon the holder to show that he purchased it in good faith, without notice, and in the usual course of business. Gibberson v. Jolley, 120 Ind. 301, 22 N. E. Rep. 306; Tescher v. Merea, 118 Ind. 586, 21 N. E. Rep. 316.

There is plausible ground for the contention that the evidence does not sustain the verdict, but considering that the burden was on the plaintiff below to show that he purchased the note in good faith, we cannot disturb the judgment on the evidence. The jury were entitled to consider that the plaintiff and his assignor were on terms of intimacy, engaged in the same general business, and they may not have been satisfied with his statement that he had no notice, and made no inquiry, concerning the consideration of the note. We fully concede the position that the holder of negotiable paper who takes it before maturity in the usual course of business, without notice of facts which impeach its validity between antecedent parties, or of such facts as put him upon inquiry, holds it by a good title, free from defenses, and that unless there are circumstances which excite suspicion the purchaser is not bound to make inquiry at the time of purchase. Tescher v. Merea, *supra;* Goodman v. Simonds, 20 How. 343; Johnson v. Way, 27 Ohio St. 374. Where, however, the circumstances show that the purchaser of paper refrained from making inquiry lest he should thereby become acquainted with the transaction out of which the note originated, he cannot occupy the attitude of a holder in good faith without notice. The plaintiff's evidence shows that he purchased five notes, including the one in suit, against five different persons, at the same time, from a person with whom he was upon intimate terms, and who is shown to have been more or less connected with the Bohemian oats scheme. These notes were sold at a rate much above the ordinary discount, and we cannot say that the jury were not warranted in drawing the inference that the plaintiff had such knowledge as made it his duty to inquire. As we have already seen, the bond upon its face shows that the transaction was of a speculative or wagering character, and, although it formed the chief consideration for the note in suit, it was of no value as a contract. The defendants were not bound to return it as a condition precedent to their right to make defense. The judgment is affirmed, with costs.

NOTE.—Notes similar to the one in question in the principal case, originating in fraudulent scheming, Bohemian oats or Red Lyon wheat transaction, have been a most fruitful source of litigation in the States of Ohio, Indiana and Michigan in the past few years.

In Ohio, at first some of the inferior courts were inclined to hold that it was a gambling transaction, and that the notes were absolutely void (Williams v. Keel, 17 W. L. Bull. 119); but the majority soon held the contrary. 17 W. L. Bull. 209, 249. In Harley v. Weber, 2 Ohio C. C. Rep. 57, it was held that parol evidence, as to the conversation or declarations of the parties at the time, is inadmissible to vary or contradict a written contract, and that where a promissory note, absolute on its face, is given for a quantity of Bohemian oats, it being agreed at the same time, verbally, between the maker and the agent, that such note should not become due and payable and called for until fifty bushels of the oats to be raised from the seed the ensuing year should be sold for the maker by the payee at $10 per bushel, such agreement, not being performed within one year, must be in writing; and to be available as a defense, the answer must allege that such agreement was in writing.

In Shirey v. Ulsh, 2 Ohio C. C. Rep. 401, where Ulsh had sold Shirey fifteen bushels of Bohemian oats at $10 per bushel, and as a part of the contract, Ulsh agreed that thirty bushels of Bohemian oats should be sold for Shirey the next year, at $10 per bushel, both parties knowing that said oats were worth not more than fifty cents per bushel, it was held that such contract is fraudulent, immoral and void, and that the law will leave the parties to such contracts where it finds them.

In Stewart v. Simpson, 2 Ohio C. C. Rep. 415, it was held that where an individual enters into a contract with a Bohemian oats company, whereby the latter sells and delivers to the former a quantity of oats at the price of $10 per bushel, and at the same time executes to such purchaser a bond conditioned to sell for him, within a stipulated time, twice the quantity of oats so by him purchased, at the same price per bushel, and in consideration thereof, the purchaser executes to such company, or its agent, a promissory note for the amount of such purchase, such contract is not, nor is such note void under section 4269 of the Revised Statutes. In this case it was said: "The second assignment raises the question whether the transaction described in the pleadings was in violation of the provisions of section 4269 of the Revised Statutes, which, so far as it is material to the present inquiry, reads as follows: 'Section 4269. All * * * notes * * * or other contracts, * * * where the whole or any part of the consideration * * * is for money, or other valuable thing whatsoever, won or lost, laid, staked or betted, at or upon any game of any kind, or under any denomination or name whatsoever, * * * or any wager * * * shall be absolutely void and of no effect.'

"In construing this section with reference to the transaction described in the answer, the question arises as to what constitutes a bet or wager. In Harris v. White, 81 N. Y. 539, the court say: 'A bet or wager is ordinarily an agreement between two or more, that a sum of money or other valuable thing (in contributing which all agreeing take part) shall become the property of one of them, on the happening in the future of an event at present *uncertain*.'

Again, in *Ex parte* Young, 6 Biss. 67, it is said that 'a wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event.' To the same effect are 44 How. Pr. 207; 1 Bosw. 212; 22 Vt. 293. Thus it will be observed that a bet or wager involves the elements of mutuality, risk and uncertainty, the absence of which will destroy the wagering character of a given transaction. Both parties to a bet or wager must concur in the purpose to risk the thing laid, staked or betted, and in the intent that the same shall be won or lost upon the uncertain event or contingency. The term *wager* is sometimes applied, popularly, to transactions of a gambling character, called *options*, *futures*, etc. Whether the phrase, *any wager*, used in the section under consideration, can be held to include such transactions may be doubted, but the decision of the question is unnecessary here, since the contract in controversy differs in a material respect from an *option*, in that, in the latter it is understood between the parties from the beginning that there is no delivery of the property dealt in, but the contract price and the market price at a given time in the future. See Davey on Contracts, 28. In this case the oats were delivered concurrently with the execution of the note sued on. Under the rules above stated, can it be said that anything was laid, staked or betted in the transaction set forth in the answer? Do the facts stated constitute a bet or a wager, or a violation of the section above quoted?

"The contract between Stewart and the company, as stated in the pleadings, was that the former should purchase of the latter twenty bushels of oats at $10 per bushel, and execute the note sued on therefor; in consideration whereof the company was to deliver said oats, and agree and undertake, within one year thereafter, to sell for Stewart forty bushels of oats at $10 per bushel; and to secure the performance of such agreement, was to execute a bond conditioned accordingly. All of which was done. It seems to us that there was no risk or uncertainty in this transaction. The sale to Stewart was absolute and accompanied by immediate delivery of the property. The agreement to sell oats for Stewart the following year was unconditional, and its performance, so far as the record shows, fully secured. There is no allegation or claim that the bond was or is worthless. For aught that appears, Stewart is fully protected and has no hazard. The time for the performance of the agreement to sell was fixed with reasonable certainty, and, as above stated, was to be performed at all events."

In Kitchen v. Loudenback, 3 Ohio C. C. Rep. 228, it was held that, although the payee for a *red line wheat* note cannot recover thereon, it is valid in the hands of a *bona fide* holder; and if his title be otherwise perfect, it cannot be impeached by showing that he took the note under circumstances which ought to excite suspicion in the mind of a prudent man, unless they further show that his purchase was in bad faith, and that a *bona fide* holder of a negotiable note void as between the original parties, is entitled to recover the amount due by the terms of the note, without regard to the consideration which he paid therefor. In Davis v. Seeley, 20 W. L. Bull. (Mich. Sup. Ct. 1888) 215, the court arrived at a similar conclusion.

In M'Namara v. Gargett, 68 Mich. 454, suit was brought upon a promissory note which read as follows:

$125. SUMNER, October 21, 1885.

Fourteen months after date I promise to pay to A. A. Griffith or bearer, one hundred and twenty-five dollars, value received, with interest at seven per cent. per annum. W. J. GARGETT,

This note was given for the one-half purchase price of 25 bushels of Bohemian oats at $10 per bushel. The oats were delivered, and with them an obligation, partly printed and partly written, which entered into and formed part of the contract, and executed by said Griffith as superintendent, of which the following is a copy:

No. 340.

A bond from the Lenaria, Clinton and Gratiot county Bohemian Oat Association.

(To be signed by our superintendent, A. A. Griffith.)

We hereby agree to sell 50 bushels of Bohemian oats at ten dollars per bushel, for Wm. J. Gargett, of Sumner township, Gratiot county, State of Michigan, on or before the twenty-first day of October, 1886, said W. J. Gargett to pay the L., C. & G. Association 12 1-2 per cent. for bonding said oats, if he sells them himself, or 25 per cent. for selling and bonding in cash, upon the presentation of the orders and bonds. And the first oats sold by this or any other association, or by the owner, or any one else, shall be applied to the redemption of this bond.

A. A. GRIFFITH, Sup't.

This bond and note were held as one contract, and void as between the parties. But had the note gone into the hands of a *bona fide* holder, a different rule would have been applied.

In Sondheim v. Gilbert, 18 N. E. Rep. 687 (Ind. 1888), it was held that under 2 Rev. St. N. Y. ch. 20, tit. 8, §§ 8, 16, making void all wagers, all contracts, for or on account of any money, property, or thing in action wagered; and all securities, any part of the consideration of which is money won by playing at any game, or by betting thereon; or money knowingly lent at the time and place of such play to any person so playing—a note payable to the maker's own order, and indorsed and negotiated by him for the purpose of raising money for the purpose of dealing in options, is not void in the hands of one who before maturity received it for value, in due course of trade, without notice of the purpose for which it was executed. In this case it was said: "The principle may be considered as well established, that when a statute in express terms pronounces contracts, notes, bills, securities and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority. New v. Walker, 108 Ind. 365; Thompson v. Bouvie, 4 Wall. 463; Vallett v. Parker, 6 Wend. 615; Daniel on Negt. Inst. §§ 193, 807. In such a case the note will be declared void in the hands of an innocent holder in pursuance of the peremptory words of a statute which embraces in its terms the contract or obligation under

consideration. Town v. Eagle, 84 Ill. 292. The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill or note, void; but unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note, in the hands of an innocent holder for value, will be held valid and enforceable." Hatch v. Burroughs, 1 Wood. 439: Town of Eagle v. Kohn, 84 Ill. 292; Bank v. Tinsley, 11 Mo. App. 498; Bank v. Harrison, 3 McCrary, 316; Edwards v. Dick, 4 B. & Ald. 212; Day v. Stuart, 6 Bing. 109; 2 Rand. Com. Paper, § 511. In the absence of a statute in direct terms prohibiting transactions of the character of the kind in question, and declaring them unlawful, or expressly declaring promissory notes growing out of the transaction invalid, while the courts will, on general common law principle, declare such notes invalid between the parties and those who were accessory to the illegal act, yet, in order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise that they became *particeps criminis*. Sondheim v. Gilbert, 18 N. E. Rep. 689; Tyler v. Carlisle, 79 Me. 210; Waugh v. Beck, 114 Pa. St. 422; Tracy v. Talmage, 14 N. Y. 162; Arnot v. Coal Co., 68 N. Y. 558. See also Commings v. Henry, 10 Ind. 109; Feineman v. Sachs, 33 Kan. 621; Distilling Co. v. Nutt, 34 Kan. 724; Fisher v. Lord, 63 N. H. 514; Oil Co. v. Bogett, 44 Ark. 230. The reader will find interesting articles relating to promissory notes in 22 Cent. L. J. 136, 23 Cent. L. J. 149, 27 Cent. L. J. 159.

WM. M. ROCKEL.

CORRESPONDENCE.

MORAL OBLIGATION AS A CONSIDERATION FOR CONTRACTS.

To the Editor of the Central Law Journal:

In the article on Moral Obligation as a Consideration (32 Cent. L. J. 53), is the following statement: "It may be taken as a settled rule, that a contract, the consideration of which is a previous moral obligation, is generally enforceable in courts of law." This statement is certainly incorrect. Except in Pennsylvania, and perhaps in one or two other States, a moral obligation is no consideration. Promises to pay a debt released by a discharge in bankruptcy or barred by the statute of limitations are enforced on the ground of waiver. Although there are loose expressions in the courts of some of the other States regarding moral obligation, the fact that the cause of action is not the subsequent promise, but the former liability, and that it is that liability on which suit must be brought, shows that the real basis of the action is the waiver of a right given by the statute. See Ilsley v. Jewett, 3 Metc. 439, cited in the article in question.

In the principal case relied on, Hawkes v. Saunders, 1 Cowp. 290, it is true that Lord Mansfield did essay to introduce the doctrine of moral obligation into our law. The doctrine there enunciated was received, for a time, as good law, but the learned annotators of Wennall v. Adney, 3 B. & P. 247, in a very exhaustive note, combatted the idea that the *dicta* of Mansfield and Butler, in Hawkes v. Saunders, were sound. The note to Wennall v. Adney has since been followed and moral obligation repudiated. See Eastwood v. Kenyon, 11 A. & E. 438; Kent v. Rand, 64 N. H. 5; Hare on Contracts, §§ 262-271; Langdell on Contracts, §§ 71-79, where Prof. Langdell reviews the cases and states that since 1840 the doctrine of moral obligation has received no countenance from any quarter.

Ithaca, N. Y. EDWARD CORNELL.

RECENT PUBLICATIONS.

THE LAW OF COLLATERAL INHERITANCE, Legacy and Succession Taxes, Embracing the American and many English Decisions, with Forms for New York State, and an Appendix giving the Statutes of New York, Pennsylvania, Maryland and Connecticut. By Benj. F. Dos Passos, Assistant District Attorney New York County. New York: L. K. Strouse & Co., 63 Nassau street.

Considering the support which this tax has received from writers and judges, and the manifestly equitable grounds upon which it rests, it is surprising that it has not been adopted in all of the States of the Union. The fact is, however, that the collateral inheritance tax exists in about nine States only. It was first introduced by the legislature of Pennsylvania in 1826. Her example was followed by Louisiana in 1828, where the tax was, however, restricted to alien heirs, and subsequently statutes were passed in Virginia in 1844, North Carolina 1846, Maryland 1864, Deleware 1869, New York 1885, West Virginia 1887, and finally in Connecticut in 1889. As there seems to be little doubt that it will eventually become a law in all of the States, this book will undoubtedly grow in value from time to time. The taxation comprehensively known in this country as the "Collateral Inheritance Tax" seems to have received the sanction of all writers and thinkers upon the subject of taxation. After a person is dead, the government steps in and places his property in the hands of those designated by him as his successors. It seems to be equitable that for this service it should levy a tax upon the property devolving upon the heirs, and certainly it may be with reason contended, that such a tax involves less hardship than any other tax, incident to government. This book treats of the reasons for the collateral inheritance, legacy and succession taxes, their nature and constitutionality, of the exemptions from such taxation, of the rules of the domicile as governing its application, of appraisement and of remedy and practice in connection with such tax. The book contains 350 pages, and having been prepared by one who in the performance of his official duties as district attorney of New York, had much to do with the enforcement of the law, renders his work of practical value.

BOOKS RECEIVED.

PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, By William T. Brantly, of the Baltimore Bar. Editor of the Annotated Edition of the Maryland Reports: Assistant Professor in the Law School of the University of Maryland. San Francisco: Bancroft-Whitney Company. Law Publishers and Law Booksellers. 1891.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. APPEAL—Ouster.—Under Code Colo. 1887, § 388, providing that appeals to the supreme court from the district, county, and superior courts shall be allowed in all cases where the judgment appeal from be final, and shall amount, exclusive of costs, to $100, or relate to a franchise or freehold, no appeal lies from a judgment of ouster entered by a district court in an action for the usurpation of a public office.— *Londoner v. People*, Colo., 25 Pac. Rep. 183.

2. APPEAL—Parties.—An action, entitled in the circuit court in the individual names of the parties, appeared from the complaint to be brought against defendant, as trustee of a school township; but on appeal from a judgment in his favor, the cause was entitled in the supreme court, and error was assigned against him as trustee of the civil township: *Held*, that as the school township and civil township are, under the laws of Indiana, distinct corporations, although in the same territorial subdivision, and represented by the same person, no question was presented by the assignment of error, and the judgment should be affirmed.—*Braden v. Liebenguth*, Ind., 25 N. E. Rep. 899.

3. APPEARANCE BY ATTORNEY. — The authority of an attorney to appear for a party to an action in a court of record may be controverted while the action is pending.—*Dillon v. Rand*, Colo., 25 Pac. Rep. 185.

4. ATTACHMENT—Affidavit—Discharge. — Affidavits in support of, or in opposition to, a motion to discharge an order of attachment, ought to be confined to the truth or falsity of the causes set forth in the affidavit for attachment.—*Chappell v. Comins*, Kan., 25 Pac. Rep. 216.

5. ATTACHMENT — Mortgaged Personalty. — Creditors who attach mortgaged personal property in the hands of the mortgagee do not thereby acquire his title as against their debtor's assignee for the benefit of creditors. The latter is entitled to the property as against everybody but the mortgagee himself. — *Dupuy v. Ullman*, Tex., 14 S. W. Rep. 790.

6. BANKS AND BANKING — Payment of Check by Mistake.—Plaintiff bank in the regular course of its business received checks drawn by C upon defendant, a private banker, which were forwarded to F, its correspondent, for collection, and paid by draft, payment of which was afterwards stopped by defendant. In an action on the draft, defendant pleaded that it was executed under the mistaken belief that C had sufficient funds on deposit to meet the checks. On the trial defendant testified that he drew the draft in reliance upon C's statement that a certain check left by him with defendant for collection would be paid, and that such check was not paid: *Held*, that the mistake attempted to be proved was not the one relied on in the pleading, and that neither of them was available as a defense.— *First Nat. Bank of Denver v. Devenish*, Colo., 25 Pac. Rep. 177.

7. BOUNDARIES—Monuments.—The actual location of lines and monuments on the ground, will control over courses and distances, and, if such monuments can be found, the courses and distances must give way.—*King v. Brigham*, Oreg., 25 Pac. Rep. 150.

8. CARRIERS—Loss of Freight.— Under a bill of lading providing that the carrier shall not be liable for loss or damage by fire, the burden of proof is on the carrier not only to show that the cause of loss was within the exception, but also that there was no negligence on its part. — *Missouri Pac. Ry. Co. v. China Manuf'g Co.*, Tex., 14 S. W. Rep. 785.

9. CARRIERS—Passengers—Negligence. — In an action against a railroad company for injuries to a passenger occasioned by a washout at a culvert, the fact that the culvert would not have given way but for the breaking of a dam on adjoining property over which the company had no control will not prevent recovery, if the negligent manner in which the culvert was constructed contributed to the accident.—*Bonner v. Wingate*, Tex., 14 S. W. Rep. 790.

10. CHATTEL MORTGAGES. — In an action by an assignee in insolvency against one to whom the insolvent had mortgaged his stock of goods, there being no evidence that, at the time the mortgage was made and possession given the mortgagee, the mortgagor contemplated making an assignment, the court did not err in refusing to charge that the mortgage was void, if, at the time of making it, the mortgagor contemplated making an assignment, and the mortgagee knew this, etc.—*Dupuy v. Burkitt*, Tex., 14 S. W. Rep. 789.

11. CHATTEL MORTGAGES— Fraudulent Conveyance.—On the day of execution of chattel mortgages to secure loans previously made to the mortgagor, it was agreed between the mortgagor and the agent of the mortgagees that the mortgagor should continue in possession of the mortgaged goods, and continue to sell them, and should account to the mortgagees for the proceeds of sales: *Held*, that, under the Indiana statutes making fraud a question of fact, such agreement did not, of itself, render the mortgages fraudulent. — *Fletcher v. Martin*, Ind., 25 N. E. Rep. 886.

12. COLLATERAL INHERITANCE TAX.—A legacy given to an illegitimate son, who, by an act of the legislature authorizing testator to adopt said child as his heir, was made the heir of said testator capable of inheriting the estate of said testator "as if he had been born in lawful wedlock," is subject to the collateral inheritance tax.—*Commonwealth v. Ferguson*, Penn., 20 Atl. Rep. 870.

13. CONSTITUTIONAL LAW—Alibi.—Where an *alibi* is set up as a defense, and several witnesses testify thereto, it is proper for the court to instruct the jury that fixing the time of a transaction occurring several days before, within an hour or a half-hour, without anything to fix the time, was uncertain. — *Commonwealth v. Orr*, Pa., 20 Atl. Rep. 866.

14. CONSTITUTIONAL LAW—Ordinances. — A city ordinance, having for its object the prevention of the use of unwholesome well water in making of bread for public distribution and consumption, may validly require, as a means to that end, the filling up of wells on premises where such bread is made.—*State v. Schlemmer*, La., 8 South. Rep. 307.

15. CONSTITUTIONAL LAW—Parishes—Changing Boundaries.—The constitution of the State has not given the legislature unlimited discretion in the matter of creating new parishes, or changing the boundary lines of

existing parishes, but has imposed important limitations on the legislative power in these respects, and on the methods of exercising the same.—*State v. Ellis*, La., 8 South. Rep. 305.

16. CONTEMPT—Receiver.— Town ordinances granted a steam motor company the right to construct and operate its road through the streets of the town. In an action to foreclose a mortgage on the road, a receiver was appointed by the circuit court, and ordered to operate the road: *Held* that, even though the ordinances were void, it was a contempt of court to cause the receiver's arrest on a complaint charging him with a violation of Pen. Code Cal. § 370, declaring anything a public nuisance which obstructs the free use of a street or highway.—*United States v. Murphy*, U. S. C. C. (Cal.), 44 Fed. Rep. 39.

17. CRIMINAL EVIDENCE—Interpreter.—Where an interpreter has been appointed and appointed and duly sworn to interpret the testimony of a witness, who did not understand the English language, and it is made evident that he was competent, and faithfully and correctly interpreted the language of the witness, there was no ground for objection. — *State v. Hamilton*, La., 8 South. Rep. 304.

18. CRIMINAL LAW — Murder. — The defendant and G became engaged in a personal difficulty in which G was killed by the defendant, but the evidence failing to show that the killing was perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual: *Held*, not to be murder in the second degree.—*Golding v. State*, Fla., 8 South. Rep. 311.

19. CRIMINAL LAW—Ordinance—Lotteries. — Constitutional provisions and forms of proceeding relating to crimes denounced by the public criminal statutes of the State do not apply to violations of mere municipa ordinances save to a very qualified extent. — *State v. Boneil*, La., 8 South. Rep. 298.

20. CRIMINAL LAW—Rape.—A female under 12 years of age is incapable of yielding consent to sexual intercourse.—*State v. Miller*, La., 8 South. Rep. 309.

21. CRIMINAL PRACTICE—Embezzlement.—Under Code Miss. § 2790, which provides that "if any officer or other person employed in any office within this State shall commit any fraud or embezzlement therein, he shall be imprisoned," etc., an indictment for embezzlement is sufficient, when it alleges in the first and second counts that defendant, the State treasurer, did willfully, fraudulently, and feloniously embezzle and convert to his own use money of the State intrusted to him, and in the third count that he willfully, fraudulently, and feloniously omitted to pay over to his successor in office certain money of the State remaining in his hands as such treasurer.—*Hemingway v. State*, Miss., 8 South. Rep. 317.

22. CUSTOM AND USAGE—Evidence.—By a written contract plaintiff, who was cultivating tomatoes, agreed to deliver them to defendant as they should ripen, from day to day, and defendant agreed to receive, unload, and weigh them "on usual business hours, from 6 o'clock on Monday morning till 10 o'clock on Saturday morning of each week during the season." A stipulated amount was to be paid as liquidated damages for any default: *Held*, in an action for such damages for defendant's failure to attend at its place of business and receive the tomatoes, according to contract, that evidence of a usage by which, under like contracts during previous years, defendant's warehouse was not open until 7 o'clock in the morning, was not admissible. — *Van Camp Packing Co. v. Hartman*, Ind., 25 N. E. Rep. 901.

23. DECEIT—Evidence.—In an action for deceit plaintiff alleged that defendant had sold him a note purporting to be made by a firm, and falsely represented that said firm consisted of two certain men, and defendant answered that he sold the note as the agent of the payee, which plaintiff then knew, and that he only said that he was informed that firm consisted of said two men: *Held*, that whether defendant stated to plaintiff that the firm consisted of said two men, and whether he also stated at the time of the sale that he was selling the note for the payee, were questions for the jury. Affirming 55 N. Y. Super. Ct. 233. — *First Nat. Bank v. Gallaudet*, N. Y., 25 N. E. Rep. 909.

24. DEED TO RAILROAD COMPANY—Right of Way.—A deed to a railroad company conveyed to it "the right of way for its railroad, and the right to construct said railroad agreeably to and in accordance with the laws of the State," referring to certain statutes: *Held*, that the deed did not vest in the grantee title to land six rods in width—that being the quantity which the company could acquire under the statutes, but only the quantity actually taken and used by it.—*Ft. Wayne, etc. R. Co. v. Sherry*, Ind., 25 N. E. Rep. 898.

25. DEPOSITIONS.—Our statute requires the certificate of an officer, before whom a deposition has been taken, to show that the deponent was first sworn "to testify the truth, the whole truth, and nothing but the truth." A certificate by such officer, which shows that the deponents were sworn "to testify the whole truth of their knowledge touching the matter in controversy," is defective, and it is error to overrule a motion, to suppress such deposition, alleging such defect as ground therefor.—*Western Union Tel. Co. v. Collins*, Kan., 25 Pac. Rep. 187.

26. DIVORCE—Vacating Decree.—A decree of divorce on service by publication cannot be vacated on a petition alleging, not that any fraud was perpetrated in obtaining the decree, but that the plaintiff in the divorce suit was never married to the defendant, and that, at the time of the alleged marriage, the defendant had a lawful wife living, and was of unsound mind, all of which the plaintiff knew; Rev. St. Mo. 1879, § 2185, providing that no petition for review of any judgment of divorce shall be allowed.—*Richardson v. Stowe*, Mo., 14 S. W. Rep. 810.

27. DURESS—Confession of judgment.—Threats by an agent, made to debtors of his principal, that, unless they execute a power of attorney to confess judgment for the debt, it will be prosecuted to judgment, with attorneys' fees thereon, and that they will be pursued to insolvency, do not constitute duress, for which the judgment entered on the powers of attorney so obtained should be set aside.—*Wilson S. M. Co. v. Curry*, Ind., 25 N. E. Rep. 896.

28. ELECTIONS—Names of Candidates.—If, for a certain office, there is but one person running of a given name, say the name of G. L. Calvert, he should be permitted to show, in a proper action brought therefor, that ballots cast bearing respectively the names "Calvert," "A. L. Calvert," and "J. C. Calvert," were meant and intended by the voters so casting them to have been cast for G. L. Calvert.—*Calvert v. Whitmore*, Kan., 28 Pac. Rep. 224.

29. EMINENT DOMAIN — Compensation. — A railroad company carried its track over a street under an ordinance requiring it to erect and maintain a suitable bridge, "so as to allow of the use of the full width of the street." The street was subsequently widened, the city taking property on each side from the railroad company for that purpose: *Held*, that the cost of reconstructing the bridge is an element of damage to be allowed the company in such proceedings.—*Kansas City v. Kansas City Belt Ry. Co.*, Mo., 14 S. W. Rep. 808.

30. EMINENT DOMAIN—Compensation.—In an action to recover the value of a tract of land appropriated by a railway company for right of way, which, at the time of its condemnation, was not platted as a part of a city but was in use as farming land, it is erroneous to permit witnesses to testify to the value of lots on the principal business street of a city near by. The value of such lots furnishes no proper measure by which to ascertain the value of the land taken.—*Kansas City & Topeka Ry. Co. v. Splitlog*, Kan., 25 Pac. Rep. 202.

31. EMINENT DOMAIN—Compensation.—In the trial of a case, upon appeal from an award of damages in condemnation proceedings, the court permitted the plaint-

iff, as a witness, to answer the question. "How much less was the farm worth immediately after the railroad went through, per acre, than it was before?" *Held*, that it was error, as it involved substantially the subject-matter the jury were called upon to determine.—*Chicago, K. & W. R. Co. v. Muller*, Kan. 25 Pac. Rep. 210.

32. EQUITY—Accounting.—In proceedings to construct a free gravel-road, assessments on contiguous lands were made, and county bonds were sold to raise money therefor for their full face value, the proceeds going into the general fund of the county. Afterwards, certain land-owners brought separate suits to restrain the county officers from placing on the tax duplicate the assessments on their lands, and to have the assessments declared void, and recovered judgments; but one such judgment, on appeal, was reversed: *Held*, that purchasers of the bonds, who were not parties to, and had no notice of, these actions, could maintain an action in equity for an accounting by the county, and its officers, of money received from such assessments.—*Spydell v. Johnson*, Ind., 25 N. E. Rep. 889.

33. ESTOPPEL BY DEED.—Where an owner of land abutting on a street for a valuable consideration releases a railroad company from all claims for damages by reason of the maintenance of its railroad in such street, he cannot afterwards maintain an action to enjoin the company from changing its track from a narrow to a broad gauge.—*Denver, U. & P. R. Co. v. Toohey*, Colo., 25 Pac. Rep. 166.

34. EVIDENCE—Proof of Record.—The justice before whom the prosecution was brought testified that he made no record of the proceedings, and his testimony as to the trial and discharge of plaintiff being objected to, he was permitted to make such a record in his docket, which was then admitted in evidence: *Held*, not error, the making of such entry being a mere ministerial act, which the justice might perform at any time.—*Cottrell v. Cottrell*, Ind., 25 N. E. Rep. 905.

35. EXECUTION—Exemption.—In an action on a promissory note, defendant pleaded by way of set-off, plaintiff's indebtedness to him exceeding the note sued on; to which plaintiff replied that he was a resident householder of the State, and had less property than the law exempted from execution, and claimed the note in suit as exempt: *Held*, on demurrer that the reply was good. A debtor may rightfully claim a promissory note as exempt from execution, although the maker holds notes or judgments against him.—*Smith v. Sills*, Ind., 25 N. E. Rep. 881.

36. EXECUTION—Lien.—Where a general judgment is rendered against a mutual fire insurance company and its property generally, but the insurance company was doing two kinds of business, a first-class and a second-class, and the policy upon which the judgment was rendered belonged to the second-class business only, and the company at the time had no second-class assets, the judgment and a general execution issued thereon and following the judgment are valid, and may be enforced as to any property belonging to the insurance.—*Kansas Farmers', etc. Ins. Co. v. Amick*, Kan., 25 Pac. Rep. 211.

37. EXECUTION—Sale of Mortgaged Property.—Where mortgaged personal property is sold on execution, and the mortgagee, who is not the defendant in the execution, or his legal representative purchases the same, the court from which the execution was issued may in any proper proceeding with all the interested parties before it, make an order that any surplus money remaining after the satisfaction of the execution, with interest and costs, shall be paid to the party or parties having the paramount right thereto, and if it be shown that the mortgagee has the paramount right thereto the court should order that the surplus moneys should be paid to him.—*Walker v. Braden*, Kan., 25 Pac. Rep. 195.

38. EXECUTORS—Filing Accounts.—The testamentary executor, confined to jail because of non-compliance with the court's order to file an account of his administration, presented his account. Although not complete as to form, and possibly not correct, it is a statement and an account which should be set for trial. A trial should be had, and the admissible evidence offered and admitted. The assets of the succession under his administration should be proven, and judgment rendered for the balance, after having deducted the debts proven to have been paid.—*State v. Blackman*, La., 8 South. Rep. 302.

39. EXECUTORS—Liability for Acts of Co-executor.—An executor being about to leave the State temporarily turned over to his co-executor the funds in his hands. Thereafter he took no part in the management of the estate, but his co-executor attended to the business. The executors filed a joint account four years after the time prescribed by the statute. At this time said executor knew that there was a shortage which he personally made up, without reporting it. He never made any effort to have a final settlement of such account: *Held*, that his co-executor having thereafter used the funds on hand at the time of such report, and having become insolvent, said executor was liable therefor.—*In re Osborn's Estate*, Cal., 25 Pac. Rep. 157.

40. EXECUTORS AND ADMINISTRATORS.—One executor cannot sue his co-executor for money or property in his hands belonging to the estate of the deceased.—*Taylor v. Minton*, Kan., 25 Pac. Rep. 222.

41. FIXTURES—Buildings on Government Reservation.—Buildings erected on a military reservation by a post trader, under authority from the war department, for the purpose of trade, do not become a part of the realty, and the owner when he ceases to be post-trader, may remove and dispose of the same as his own property.—*Mayer v. Waters*, Kan., 25 Pac. Rep. 212.

42. FRAUDULENT CONVEYANCES—Evidence of Intent.—Upon a question of fact as to whether a sale of personal property was made for the purpose of hindering, delaying, and defrauding the creditors of the seller, it is competent for the seller, as a witness, to testify directly as to whether he in fact intended by the sale to hinder, delay, or defraud his creditors.—*Gardom v. Woodward*, Kan., 25 Pac. Rep. 199.

43. HIGHWAYS—Establishment.—The board of county commissioners may act in the matter of establishing a free turnpike road, under Rev. St. Ind. 1881, § 5091, *et seq.*, at a special session.—*Fleener v. Claman*, Ind., 25 N. E. Rep. 900.

44. HOMESTEAD—Abandonment.—Gen. St. Colo. ch. 51, § 3, providing that homesteads shall only be exempt while occupied as such by the owner thereof, or his or her family, does not require an actual personal occupation at all times and under all circumstances, so as to cause a forfeiture on account of a temporary absence from necessity or convenience. — *Pierson v. Truax*, Colo., 25 Pac. Rep. 183.

45. INFANTS—Process. — A mechanic's lien was filed against a father and his infant child; the title to the land standing in the name of the infant. The *scire facias* thereon was returned "served" on the father, but as to the infant "not served, as said person was found to be a minor child of defendant." Without having a guardian *ad litem* appointed for the infant, or taking any further notice of it, judgment in default of affidavit of defense was entered: *Held* that, though there was a general appearance by attorney for both defendants, the judgment was void as against the infant.— *Brown v. Downing*, Penn., 20 Atl. Rep. 871.

46. INJUNCTION — Fraudulent Conveyance. — In an action to set aside judgments and a sheriff's sale thereon, on the ground that the judgments were confessed in violation of an injunction obtained by plaintiffs against the judgment debtor in a previous suit against him, the complaint alleged that the injunction was obtained on an affidavit showing an emergency, and described it as restraining him from selling, conveying, or otherwise incumbering his land therein described: *Held* that, as there could be no other ground for the injunction order than that stated in Rev. St. Ind. 1881, § 1148,—that defendant threatens or is about to remove or dispose of his property with intent to defraud

his creditors,—the injunction must be construed to restrain the debtor from removing, transferring, or incumbering his property in fraud of his creditors; and as the complaint did not allege that the debts on which the judgments were rendered were not just debts, and the debtor had the right to prefer his creditors, and as no equity of plaintiff superior to the judgment creditors appeared, the judgments were not shown to be fraudulent, and therefore did not violate the injunction, and a demurrer to the complaint must be sustained.—*Lee v. Gross*, Ind., 25 N. E. Rep. 891.

47. INJUNCTION — Waste. — A bill for an injunction to prevent the commission of waste, which shows that the plaintiff is an applicant to purchase the premises from the United States as mineral land; that his right to so acquire the title is being contested in the United States land office; and that the defendants claim title adversely to him,—does not state a case within any known exception to the general rule, that equity will not interfere by injunction to prevent waste when the complainant's title is disputed. — *McBride v. Board of Commissioners*, U. S. C. C. (Wash.), 44 Fed. Rep. 17.

48. INSURANCE—Authority of Agent. — An agent, authorized to take applications for insurance should be regarded to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company and not to the assured. — *State Ins. Co. v. Gray*, Kan., 25 Pac. Rep. 197.

49. INSURANCE—Representations.— Where untrue answers are given to interrogations propounded in writing to the applicant at the time of his procuring a written contract from a society calling for the payment of a certain sum, and there is no allusion in such contract to such answers, they are not warranted to be true, but are mere representations. — *McVey v. Grand Lodge*, N. J., 20 Atl. Rep. 873.

50. INTEREST—Taxes Paid.—In an action of ejectment for the possession of real estate, where the defense is based upon a tax title, and the case is decided adversely to the defendant, and a motion is made by the defendant to ascertain the amount he is entitled to recover by reason of taxes, penalties, and costs, paid on said real estate together with interest thereon, and said motion is not heard and decided at once, 7 per cent. prior to 1889 is the rate of interest the defendant is entitled to receive subsequent to the decision in ejectment.—*Hentig v. Redden*, Kan., 25 Pac. Rep. 219.

51. INTOXICATING LIQUORS — Civil Damage Laws. — A father, between whom and his major son neither a subsisting family relation nor that of master and servant was shown to exist, is not a person "aggrieved" by injuries to the son resulting from a sale of liquor to him while intoxicated, within the meaning of Act Pa. May 8, 1854.—*Veon v. Creaton*, Penn., 20 Atl. Rep. 865.

52. INTOXICATING LIQUORS—Jurisdiction. — As, under Const. Ind. art. 14, §§ 1, 2, and Act Va. 1789 (1 Rev. Laws Va. p. 59), "concerning the erection of the district of Kentucky into an independent State," the State of Indiana has civil and criminal jurisdiction, concurrent with the State of Kentucky, on the Ohio river, so far as it forms the common boundary between the States, the law of Indiana punishing the sale of intoxicating liquor at retail without a license applies to such a sale from a boat anchored in the Ohio river, even if south of low-water mark, which is the southern boundary of the State.—*Welsh v. State*, Ind., 25 N. E. Rep. 883.

53. LANDLORD AND TENANT — Tenancy from Year to Year.—Where a lessee for a year, upon the expiration of his term, continues in possession by the consent of the lessor, with no alteration in the agreement between them save an increase in the rent, which is duly paid, he becomes a tenant for another year.—*Zippar v. Reppy*, Colo., 25 Pac. Rep. 164.

54. LEASE—Forfeiture.—A lease provided that the rent should be payable on the 1st of each month in advance. It also gave the lessee the right to sublet, and provided "that, if any rent shall be due and unpaid for ten days after the same should have been paid under the conditions hereof, that it shall be lawful for the said party of the first part to re-enter," etc. The rent for three months being due and unpaid, the lessor agreed that it should stand until the 1st of the next month: *Held*, in ejectment by the lessor against a sublessee of half the property, that, forfeiture having been waived for those months, the action could not be maintained until demand for the rent had been made on or after the 10th of the next month. — *Sauer v. Meyer*, Cal., 25 Pac. Rep. 153.

55. LIBEL—Pleading.—The defendant, in a civil action against him for libel, may, where the alleged libel is specific, merely answer that the charge is true, but where the charge is in general terms the answer must allege the facts upon which he relies to make out the charge.—*Dever v. Clark*, Kan., 25 Pac. Rep. 205.

56. LIBEL—Pleading. — Where a petition sets out an article complained of as libelous, as follows: "It has been reported that one of our butchers has been in the habit of purchasing diseased and disabled cattle that were injured in transportation and left at the stock-yards at this place, and, after dressing their carcasses, offer the meat for sale to his customers at his market," —a general averment in the answer that the charge is true is sufficient.— *Kuhn v. Young*, Tex., 14 S. W. Rep. 796.

57. LIBEL—Privileged Communications.— In an action for distributing pamphlets containing defamatory matter, it appeared that defendant gave such a pamphlet to the governor of the State, in order to influence him regarding a bill which had passed the legislature, but there was also some evidence that defendant, at the same time, gave such pamphlets to other persons: *Held*, that the question of publication should have left to the jury, since the giving such pamphlets to third persons would not be privileged. —*Woods v. Wiman*, N. Y., 25 N. E. Rep. 919.

58. LOST INSTRUMENT— Establishment of Lost Pleadings.—Plaintiff's attorney testified that after filing the declaration, and after the case was entered on the docket, on inquiring of the clerk, he was informed that the papers were lost or mislaid, but that he, the clerk, would get them, and that witness did not know the papers were lost, and the clerk testified that it was his habit, on receiving a declaration, to annex process thereto, and that he thought he had done so in this case: *Held*, that it was not error to allow the declaration and process to be established by copy. — *Allen v. Mutual Loan & Banking Co.*, Ga., 12 S. E. Rep. 264.

59. MARINE INSURANCE—Seaworthiness.— In a suit on a marine insurance policy seaworthiness is a matter of warranty on the part of the assured, compliance with which must be averred in the complaint and is put in issue by a denial, and, though the defendant unnecessarily pleads unseaworthiness as a separate defense, he will not be required to furnish a bill of particulars. — *Ward v. China Mut. Ins. Co.*, U. S. C. C. (N. Y.), 44 Fed. Rep. 43.

60. MARITIME LIENS—Freight. — A ship-master discharged a cargo of laths, according to the direction of the consignee named in the bill of lading, which were received and piled in the yard of the purchaser, about 300 feet from the vessel. After the completion of the discharge, demand was made for the freight, but owing to disputes as to the amount, the purchaser refused to pay the freight called for by the bill of lading. The master immediately served notice that his lien for freight had never been abandoned, and afterwards seized the cargo under process in this suit: *Held*, that the lien had not been abandoned. — *Costello v. 734, 700 Laths*, U. S. D. C. (N. Y.), 44 Fed. Rep. 105.

61. MARRIAGE — Post-nuptial Agreement. — A post-nuptial agreement is void which revokes a marriage settlement, and provides that, in case the husband dies without issue of the marriage, his property shall descend to his heirs as if the marriage had never taken

place, under Rev. St. Tex. 1889, § 2847. — *Groesbeck v. Groesbeck*, Tex., 14 S. W. Rep. 792.

62. MASTER AND SERVANT—Negligence.—Where a servant is injured by an accident caused by the failure of a fellow-servant to perform a particular duty because of his absence from his post, evidence that such fellow-servant was in the habit of leaving his post when his presence there was necessary to prevent accidents, and that the master might, by the exercise of reasonable diligence, have known of such habit, is sufficient to establish the master's negligence. — *Coppins v. New York, etc. R. Co.*, 25 N. E. Rep. 915.

63. MECHANICS' LIENS—Description. — Under Act Pa. June 16, 1836, § 12, cl. 3, a claim for a lien on an oil refinery is sufficient when it gives the name thereof, describes the land on which it is located by metes and bounds, with the number of acres, and refers to an attached map whereon appears, drawn to scale, an accurate representation of the lands, and the relative location of all buildings and other structures. — *Linden Steel Co. v. Imperial Refining Co.*, Penn., 20 Atl. Rep. 867.

64. MEXICAN GRANTS—Validity. — A Mexican grant of 800 *varas* square, "at a place called Rincon, embraced within the limitation of Yerba Buena," is so vague and uncertain that nothing passes by force of the grant alone, nor will it be helped out by possession taken under it by the grantee, as the Mexican law, then in force, required possession to be given "by judicial authority, with the citation of all those bounded upon him." — *Ohm v. City of San Francisco*, Cal., 25 Pac. Rep. 155.

65. MOTGAGE—Subrogation.—A complaint alleged that plaintiffs were junior mortgagees, and that they had been compelled to pay a prior mortgage given for the purchase price of the land to the holders thereof, who thereupon delivered it to plaintiffs; that, after the purchase of the land by the mortgagor, he constructed a building on the land, for which certain defendants furnished material, and performed labor, and that they afterwards filed a notice of lien therefor, and obtained a decree against the mortgagor foreclosing their lien: *Held*, that the complaint showed a subrogation of plaintiffs to the rights of the owners of a prior mortgage, on which they were entitled to maintain a suit for foreclosure.—*Erwin v. Acker*, Ind., 25 N. E. Rep. 888.

66. MUNICIPAL CORPORATION—Annexation of Farming Land.—Farming land adjacent to a city of the second class, which has been platted into blocks and lots, may, by ordinance, be annexed to such city.—*Tilford v. City of Olathe*, Kan., 25 Pac. Rep. 223.

67. MUNICIPAL CORPORATION.—Excavation in Street.—A city is under no legal obligation to provide danger signals along an excavation, in a public street, as to one traveling outside of the street, or except at the crossings or intersections of such street, by other streets or highways; and when a person, in driving over a vacant lot or tract of ground, is precipitated over an embankment into the street and injured, the city is not liable in damages for such injury.—*Mulvane v. City of South Topeka*, Kan., 25 Pac. Rep. 217.

68. MUNICIPAL CORPORATION—Ordinance—Sentence.—The legislature authorized the city council to lengthen the term of imprisonment. The law is permissive to the council, and is not an authority to the recorder to make the commitment for a longer time than is provided in the ordinance.—*State v. Bringier*, La., 8 South. Rep. 298.

69. MUNICIPAL CORPORATION—Street Assessments.—In an action to foreclose a street assessment lien upon a lot under St. Cal. 1871-72, p. 816, it being required by the statute that the owners of the lot be sued, the burden of proof that defendants were the owners is upon plaintiff, though the answer alleges that the title was in certain persons, one of whom was not a party defendant.—*Robinson v. Merrill*, Cal., 25 Pac. Rep. 162.

70. NEGOTIABLE INSTRUMENTS—Transfer.—G was the owner of a promissory note payable to bearer, and delivered it to J, who agreed to pay for it if he could use it in a certain way. J died without having been able to use the note as contemplated, and his widow transferred it to plaintiff, who took it in good faith and for value, but after maturity: *Held*, that G was entitled to recover the note from plaintiff.—*Walker v. Wilson*, Tex., 14 S. W. Rep. 798.

71. PARTNERSHIP—Principal and Agent.—A contract, under which one delivers sheep to another, who at his own expense, is to care, for, manage, and control them, and to have the exclusive right to sell veal and muttons, and such of the ewes as may be agreed on, the net proceeds of all sales to be equally divided between the parties, does not create a partnership as to third parties.—*Friedlander v. Hillcoat*, Tex., 14 S. Rep. 786.

72. PRACTICE—Extension of Time to Plead.—Where the demurrer of the defendant has been everruled, and time given him to answer, and he does not present or file his answer in time, his application for leave for further time to answer must be addressed to the discretion of the trial court. If sufficient diligence is not shown on his part, the court will not abuse its discretion in refusing to allow the answer to be filed out of time.—*Merten v. Newforth*, Kan., 25 Pac. Rep. 204.

73. PRINCIPAL AND AGENT—Parol Evidence.—Where, in the trial of a case, the real question in controversy is the authority of a person to act as agent in procuring a loan upon real estate, and it is not established that such authority is in writing, it is competent to prove the same by parol evidence.—*Kansas Loan & Trust Co. v. Love*, Kan., 25 Pac. Rep. 191.

74. PROCESS—Foreign Corporation.—A foreign corporation, which has done no business in New York beyond negotiating a mortgage on its property, and having the bonds secured thereby put on the list of the New York Stock Exchange, is not engaged in business in the State, and no jurisdiction over it is acquired by service of summons on its president while temporarily in the State for those purposes.—*Clews v. Woodstock Iron Co.*, U. S. C. C. (N. Y.), 44 Fed. Rep. 31.

75. PUBLIC LANDS—Surveys.—Under the land laws of the United States, the line of ordinary high tide on the shore of an arm of the sea is the boundary between the land and the water at which the surveys of the public lands of the United States terminate.—*Mann v. Tacoma Land Co.*, U. S. C. C., (Wash.), 44 Fed. Rep. 27.

76. QUITCLAIM DEED.—A quitclaim deed, duly recorded, taken by the purchaser in good faith and for a valuable consideration, will prevail over a prior unrecorded deed, where the subsequent purchaser had no notice of the former deed, and could not have discovered its existence by an investigation of the public records, or by the exercise of reasonable diligence in making proper examinations and inquiries.—*Merrill v. Hutchinson*, Kan., 25 Pac. Rep. 215.

77. QUO WARRANTO—Title to Office.—An information filed in the name of the State, under the second section of the *quo warranto* act of February 2, 1872, by a person claiming title to an office, is demurrable if it does not show that he is entitled to the office.—*State v. Kennerly*, Fla., 8 South. Rep. 310.

78. RAILROAD COMPANIES—Liability for Contractors' Acts.—Where a railroad company employs a contractor to clear off and burn the rubbish from its right of way, the right of recovery against the railroad of one whose property is damaged from such fire is unaffected by the fact that the burning was carelessly done, but depends upon whether burning the rubbish was, under the circumstances, dangerous to the property of adjoining proprietors even if carefully performed.—*St. Louis, etc. Ry. Co. v. Yonley*, Ark., 14 S. W. Rep. 800.

79. REAL ESTATE BROKERS — Commissions.—In an action for services rendered by real estate brokers in procuring a purchaser for defendant's land, where there were no written pleadings in the trial court, and no testimony of any definite contract, evidence of the value of the services, based on the price for which the land sold, was properly admitted, and a judgment entered upon that basis was proper.—*Brand v. Merritt*, Colo., 25 Pac. Rep. 175.

80. REAL ESTATE BROKERS — Commissions.—Where defendant placed land with plaintiffs for sale on commission, knowing that a portion thereof belonged to a railroad company, plaintiffs' right to their commissions upon procuring a purchaser ready and willing to pay the agreed price was not defeated by defendant's refusal to deed the land, unless he received pay for the portion owned by the company.—*Cawker v. Apple*, Colo., 25 Pac. Rep. 181.

81. SALE—Warranty.—In an action on a promissory note given for part of the price of a binder machine, the answer alleged that plaintiff warrantied the machine to do good work, and to cut and bind wheat in good order; and further alleged "that said machine would not do good work, and would not cut and bind wheat in good order," and that "it would not and could not be made to do good work," and that it was "absolutely worthless:" *Held*, that these allegations, without any averments of the particulars of the breach of warranty relied on, were insufficient.—*Aultman, Miller & Co. v. Seichting*, Ind., 25 N. E. Rep. 894.

82. SCHOOL-DISTRICTS—Mandamus.—Under laws Tex. 1884, ch. 25, § 29, providing that the county commissioners' court shall establish school-districts, and that they shall not be changed without the consent of a majority of the legal voters of the districts, the court can change the boundaries of existing districts, and also divide a district, and establish in its territory two or more districts.—*Porter v. Rasberry*, Tex., 14 S. W. Rep. 794.

83. SERVICE OF WRIT — Publication — Pleading.—An affidavit for an order for the service of a summons by publication, which merely states that the action is brought to recover on two notes therein described, but not alleging any connection of defendants with the notes, is fatally defective under Code Colo. § 44, requiring such an affidavit to show that a cause of action exists against defendants.—*Beckett v. Cuenin*, Colo., 25 Pac. Rep. 167.

84. SET-OFF AND COUNTER-CLAIM—Promissory Note.—Defendant, who had made a promissory note to R, purchased from W, R's note to W, long before the execution of defendant's note, agreeing to pay therefor in goods or cash or both, at defendant's pleasure; but R's note was not delivered to defendant, because W did not have it with him at the time. Several months afterwards, and after part of the price had been paid, but before the note was delivered to defendant, he, for the first time, received notice that the note made by him to R was held by plaintiff, as indorsee of R: *Held* that, until delivery to defendant of R's note, the title thereto did not pass to him; and, therefore, although it matured before action by plaintiff against him on his own note, he could not set it off, under Rev. St. Ind. §§ 348, 5503.—*Weader v. First Nat. Bank of Crawfordsville*, Ind., 25 N. E. Rep. 887.

85. SHERIFFS—Proceeds of Attachment Sale.—Code Colo. § 109, requires a sheriff to deliver over the attached property or the proceeds thereof remaining in his hands unapplied on the judgment to defendant: *Held*, that a sheriff has no power to deduct from a balance in his hands, arising from the sale of attached property, counsel fees for defending an action of trover brought against him by a third party for the conversion of the goods levied on under the attchment.—*Cramer v. Brasher*, Colo., 25 Pac. Rep. 180.

86. SPECIFIC PERFORMANCE—Requisites.—*Held*, under the facts that specific performance would not be decreed in defendant's behalf, as the acts of part performance on which he relied were not clear and definite, and referable exclusively to the contract, and the contract itself, and its terms, were not established by clear and unequivocal evidence.—*Rogers v. Wolfe*, Mo., 14 S. W. Rep. 805.

87. STREET RAILWAY COMPANIES—Broadening Gauge.—Where a city, by its ordinance, grants to a railroad company the right of way for its tracks through certain streets, and there is nothing in the ordinance as to the width of the tracks, the company will not be enjoined at the suit of owners of abutting property from changing its track from a narrow to a broad gauge.—*Denver, etc. Ry. Co. v. Barsaloux*, Colo., 25 Pac. Rep. 165.

88. SURETIES—Contribution.—One of several sureties on a note, upon which judgment had been recovered against all the parties thereto, paid the judgment, and sued a co-surety for contribution, alleging in his complaint certain facts affecting the liability of the parties to each other: *Held*, that a demurrer on the ground that the complaint sought to impeach the judgment in the action on the note could not be sustained, as it did not appear on the face of the complaint that the relation in which the defendants in that action stood to each other was settled therein.—*Voss v. Lewis*, Ind., 25 N. E. Rep. 892.

89. TAXATION.—Where a county which owns piers in and on the banks of a navigable stream leases them and all its franchises to a person on condition that he shall erect a bridge thereon, to hold the property so long as he shall maintain the bridge and keep it in repair, such person is the owner of the superstructure of the bridge as long as the condition remains unbroken, and such superstructure is subject to taxation, though the piers are exempt.—*Lutterell v. Knox County*, Tenn., 14 S. W. Rep. 802.

90. TAXATION—Collection.—On the redemption of land sold for taxes and purchased by the State, the collector is entitled to retain only his costs and commissions without interest or penalty, though, in order to redeem, the owner is required to pay doudle the total amount of taxes, costs, and commissions.—*Ramsey v. State*, Tex., 14 S. W. Rep. 793.

91. TAXATION—Foreign Corporations.—A foreign manufacturing company which maintains an established location and an agent in New York city for the purpose of sellings its products or facilitating their sale, and which keeps funds in New York city to maintain its place of business and to enable its agent to carry on his operations, is "doing business within the State" within the meaning of Laws N. Y. 1885, ch. 359, 501, which provide that every foreign corporation "doing business within this State" shall be subject to a tax on its corporate franchise or business, to be computed on the basis of the amount of capital stock employed within the State. — *Southern Cotton Oil Co. v. Wemple*, U. S. C. C. (N. Y.), 44 Fed. Rep. 24.

92. TAX SALE—Limitation.—The payee of a note secured by deed of trust duly recorded is entitled to redeem the land from a sale under a judgment for taxes to which he was not a party, though the trustee was joined as a defendant, and the statute of limitations does not begin to run against the suit to redeem until the purchaser takes possession.—*Cockrill v. Stafford*, Mo., 14 S. W. Rep. 813.

93. TAX-SALE—Redemption.—Where a county treasurer, by a mistake in computation of time, gives in a redemption notice one day more than three years for redemption, the notice will not be held to be bad on its face.—*Hicks v. Nelson*, Kan., 25 Pac. Rep. 218.

94. TRESPASS TO TRY TITLE—Pleading.—In trespass to try title, the defendant cannot, under a plea of not guilty, prove that in a deed under which the plaintiff claims title the premises in controversy were included by mistake, and were not part of the property intended to be conveyed; and in no case can the defendant take advantage of the mistake, without tracing his own title to the grantor named in the deed, though it is admitted that he was the original owner, and a common source of title.—*Swink v. Motley*, Tex., 14 S. W. Rep. 799.

95. TRIAL—Demurrer to Evidence.—It is reversible error for the trial court to sustain a demurrer to the evidence of the plaintiff, when there is some evidence tending to prove every material fact necessary for a recovery.—*Reiner v. Cooper*, Kan., 25 Pac. Rep. 186.

96. TRIAL—Jury—Exemptions.—Exemption from jury duty is a personal privilege, and not a disqualification; and the overruling of the plea is matter of complaint for the juror, and not for defendant.—*State v. Judson*, La., 8 South. Rep. 397.

97. TRIAL—Misconduct of Jury.—A jury which had been out 12 hours, and which was nearly equally divided, agreed to cast a certain number of ballots, and that the verdict should be returned for the party receiving the majority, the jurors favoring the party in the minority to abide by the result. The ballots were cast, and a small majority were found to be in favor of defendant, for whom a verdict was returned: *Held*, that the verdict must be set aside, and that the taint was not removed by the jury answering, and returning with the verdict, interrogatories which had been submitted to them.—*Houk v. Allen*, Ind., 25 N. E. Rep. 897.

98. TRIAL—Reading of Pleadings to Jury.—Where the issue is clearly defined and thoroughly understood at the trial, a party is not entitled to read to the jury ex tracts from the pleadings, on the ground that his opponent, by failing to deny, admits a material allegation, which admission affects his credibility as a witness on his own behalf. The construction of such pleadings is for the court.—*Cook v. Merritt*, Colo., 25 Pac. Rep. 176.

99. TRIAL—Reception of Verdict.—Where, during the progress of a trial, and after the jury had retired, counsel for defendant asked permission of the judge to leave the court-room and go to his law-office, with the understanding that the judge is to send a bailiff for him, when the jury returns into court, and the judge fails to send word to counsel, and receives the verdict of the jury in his absence, and that of the defendant, and the verdict is read aloud to the jury, and no dissent made to the question as to whether it is their verdict, and the jury is not polled, *held*, that such omission on the part of the trial judge is not such an error as will cause a reversal of the judgment.—*Seaton v. Smith*, Kan., 25 Pac. Rep. 222.

100. TRIAL—Right to Jury.—In an action by one of several sureties on a note, who had been compelled to pay it, against a co-surety for contribution, the complaint alleged that the principal and the other sureties were, at the time of payment and since, insolvent, and had not then or since, any property subject to execution: *Held*, that these allegations did not render the cause one of "exclusive equitable jurisdiction," within the provision of Rev. St. Ind. 1881, § 409, that such causes should be tried by the court; and it was properly tried by a jury.—*Michael v. Albright*, Ind., 25 N. E. Rep. 902.

101. TRIAL—Separation of Jury.—Where a jury, after a cause is submitted to them, separate and go to supper, and again separate and go to breakfast, and also separate and go to dinner, without having been admonished by the court, as required by law, before either of said separations, and no showing is made that the substantial rights of the parties against whom they find were not prejudiced by such separations, it is error to overrule a motion for new trial alleging such separations as ground therefor.—*Pracht v. Whitridge*, Kan., 25 Pac. Rep. 192.

102. TRIAL—Separation of Jury.—Where a jury in a civil action separate and mingle with the public after they had retired to consider of their verdict, without permission of the court, and without having been duly admonished, as the statute requires, a presumption against their verdict arises that will vitiate it, unless it affirmatively appears that no prejudice was suffered by the losing party.—*Ehrhard v. McKee*, Kan., 25 Pac. Rep. 193.

103. TRIAL BY COURT. — Wher each party requests the court to direct a verdict in his favor, and on direction of the court a verdict is rendered which has evidence to support it, the defeated party cannot then insist upon going to the jury on a controverted question of fact, since, by moving for a verdict, he has submitted the question to the court.—*Howell v. Wright*, N. Y., 25 N. E. Rep. 912.

104. TROVER AND CONVERSION — Damages. — In an action for the value of personal property taken and converted, damages equal to the legal interest upon the value of the chattels converted may be allowed, and included by the jury in their verdict.— *Perkins v. Marrs*, Colo., 25 Pac. Rep. 168.

105. TRUSTS—Evidence.— In an action by a judgment debtor to enforce a trust in land sold under execution against him, evidence that defendant had agreed to buy the land for plaintiff, when contradicted by the defendant, and not corroborated by the conduct of the parties, is insufficient to justify a recovery.— *Hufnagle v. Blackburn*, Penn., 20 Atl. Rep. 869.

106. USURY—Liability of Banks.—Pub. Acts Tenn. 1859-60, ch. 129, does not apply to chartered banks, since they already possessed all the powers conferred, and most of those prohibited, and therefore no penalty for usury could be recovered, under the act, against a chartered bank. — *State v. Lookout Bank of Morristown*, Tenn., 14 S. W. Rep. 801.

107. WILL—Construction. — Testator devised certain property to trustees, who were to permit his three sons to occupy it. At the request of either of the sons, the trustees were to have the property appraised and convey it to any two of them who should wish to purchase it at the appraised value, and, if no two wished to purchase, the trustees were to sell the property. Whenever the sons could not agree, the trustees were to sell the property and invest the proceeds, one-third of which was to be paid to each son as he arrived at 50 years of age. If either died under that age his share was to be paid to his legal heirs. One of them requested a sale, and the property was purchased by the other two: *Held*, that the sale did not terminate the trust, but that it continued, as to the share of each, until he arrived at 50 years of age, or until he died, when it was to be distributed as personal property.—*Kendall v. Gleason*, Mass., 25 N. E. Rep. 838.

108. WILL—Parties.—A will provided that if any of the legatees should die before testator the legacies should be paid to the survivors, and that if the personal estate should be insufficient to pay them they should be a charge upon the real estate. A bill to charge the legacies upon the land alleged that certain of the legacies had lapsed, although the legatees had died since the death of the testator: *Held*, that the personal representatives of such deceased legatees were necessary parties to the bill.— *Young v. Schelley*, N. J., 20 Atl. Rep. 856.

109. WILL— Testamentary Powers. — A will provided that, when the testator's eldest son should become of age, there should be divided between the children "any balance which may remain of my estate after the payment of my debts, and the sale of so much of my estate as shall be sufficient, in the opinion of my executor, to support and educate my children:" *Held*, that the executor's authority to sell land to make provision for the support and education of the younger children did not terminate on the majority of the eldest son.—*Hallum v. Silliman*, Tex., 14 S. W. Rep. 797.

110. WILL—Trusts.—A testator made the following devise to his wife: "All the rents, income, and profits arising from my real estate until the eldest one of my children has attained the age of eighteen years; upon condition that my said wife shall raise, support, and educate my children until they respectively have attained the age of eighteen years:" *Held* that, the wife took an absolute estate in the land free from any trust. —*Zimmer v. Sennott*, Ill., 25 N. E. Rep. 774.

111. WILL — Undue Influence. — Where a will is attacked on the ground of mental incapacity, it is not enough to show that testator's mind was impaired by old age and business troubles, that he could not at all times recall the names, persons, or families of those with whom he had been intimately acquainted, and that occasionally he would momentarily lose complete control of his mental power, where the testimony of the lawyer who drew the will, and the subscribing witnesses, shows that, at the time of the execution of the will, testator was in possession of his usual mental powers.—*White v. Starr*, N. J., 20 Atl. Rep. 875.